

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

WEDNESDAY

SEPTEMBER 22, 1999

+ + + + +

The hearing convened in Room 220, 441 4th
Street, N.W., Washington, D.C. 20001, pursuant to notice at
10:21 a.m., Sheila Cross Reid, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

SHEILA CROSS REID	Chairperson
BETTY KING	Vice Chair
JERRY GILREATH	Board Member
ROBERT SOCKWELL	Board Member

ZONING COMMISSION MEMBER PRESENT:

ANTHONY HOOD	Commissioner
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COMMISSION STAFF PRESENT:

Sheri Pruitt-Williams, Secretary, BZA
Alberto Bastida, Secretary, ZC
John Nyarku, Office of Zoning

OTHER STAFF PRESENT:

Michael D. Johnson, Zoning Administrator

D.C. OFFICE OF CORPORATION COUNSEL:

Musa Eubanks, Esq.
Venita Ray, Esq.

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PROPOSERS

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P-R-O-C-E-E-D-I-N-G-S

(10:21 a.m.)

CHAIRPERSON REID: Good morning. I'd like to ask you excuse us for the delay this morning. We had an Executive Session and we had a meeting prior to the beginning of this particular segment of the hearing.

The hearing will please come to order. My name is Sheila Cross Reid. I am the Chairman of the Board of Zoning Adjustment. This is the September 22nd Public Hearing. Joining me today are Betty King, Robert Sockwell, Gerry Gilreath representing the National Capital Planning Commission and representing the Zoning Commission is Mr. Anthony Hood.

Copies of today's hearing addenda are available to you. They're located to my left near the door. All persons planning to testify either in favor or in opposition are to fill out two witness cards. These cards are located on each end of the table in front of us. Upon coming forward to speak to the Board, please give both cards to the reporter who is sitting to my right.

The order of procedure for special exception and variance cases will proceed as follows: and this is the procedure for an appeal case which we are hearing today: (1) statement and witnesses of the Applicant; (2) the Zoning Administrator or other government official; (3) the owner, lessee or operator of property involved, if not the Applicant; (4) the ANC within which the property is located; (5)

1 Intervenor's case; (6) rebuttal and closing remarks by the
2 Appellant.

3 Cross examination of witnesses is permitted for
4 persons or parties with direct interest in the case. The
5 record will be closed at the conclusion of each case except
6 for any materials specifically requested by the Board and the
7 staff will specify in another hearing exactly what is
8 expected.

9 The decision of the Board in these contested
10 cases must be based exclusively on the public record. To
11 avoid any appearance to the contrary, the Board requests that
12 persons present not engage the Members of the Board in
13 conversation.

14 Please turn off all beepers and all cell phones
15 at this time so as to not disrupt the proceedings.

16 The Board will not consider any preliminary
17 matters. Preliminary matters are those which relate to
18 whether a case will or should be heard today such as requests
19 for postponement, continuous or withdrawal or whether proper
20 and adequate notice of the hearing has been given.

21 If you're not prepared to go forward, the case
22 -- or you believe that the Board should not proceed, now is
23 the time to raise such a matter. Are there any preliminary
24 matters?

25 MS. PRUITT-WILLIAMS: Excuse me, sir, you need
26 to push the button to turn your mike on. You may sit down.

1 CHAIRPERSON REID: You may sit down.

2 MS. PRUITT-WILLIAMS: Could you state your name
3 for the record?

4 MR. EUBANKS: Musa, M-U-S-A, Eubanks,
5 E-U-B-A-N-K-S. And I'm with the Office of Corporation Counsel
6 representing the District of Columbia in this matter.

7 I've filed a Motion to Dismiss in this case,
8 which I believe if the Board will allow me, should be heard
9 before this hearing proceeds any further. In the Motion to
10 Dismiss there's a timeliness issue which we believe if the
11 Board finds that this case, these appeals were filed untimely,
12 this Board is without jurisdiction to hear this matter any
13 further.

14 I would like to proceed with my arguments
15 regarding the Motion to Dismiss if that's okay with the Board.

16 CHAIRPERSON REID: Mr. Eubanks, your mike,
17 please. Mr. Eubanks, we are familiar with that particular
18 motion and we'd just ask that rather than giving us the entire
19 argument, just basically -- just give us the highlights and we
20 have an opportunity to respond to you, but basically the
21 record has reflected very succinctly that position.

22 MR. EUBANKS: Okay. I'll just give highlights,
23 certainly.

24 MR. WILSON: Excuse me, Ms. Cross Reid, do you
25 --

26 CHAIRPERSON REID: Your mike, your name and

1 your address.

2 MR. WILSON: Excuse me, my name is Benjamin
3 Wilson on behalf of Waste Management. Do you want a listing
4 of all possible preliminary matters before we proceed with one
5 or will we just take them as they come?

6 CHAIRPERSON REID: Take them as they come.

7 MR. WILSON: All right.

8 CHAIRPERSON REID: Thank you.

9 MR. EUBANKS: Good morning, as I mentioned, the
10 Government, the District of Columbia, has filed a Motion to
11 Dismiss and I'd just like to highlight some of the points and
12 reiterate some of the points in our motion that these appeals
13 were untimely filed and therefore this Board is without
14 jurisdiction to hear this matter.

15 There was three years in this case between the
16 denial, the Zoning Administrator's denial of their original
17 certificate of occupancy applications and the filing of this
18 appeal. Now the Zoning Administrator's decision was dated
19 February 21, 1996 and these appeals were filed on February 12,
20 1999.

21 Now the regulations, Title 11 DCMR 3315.2 uses
22 the word "timely". It does not give an exact time, one year,
23 two years or whatever the case may be. It is the government's
24 position and the case law reflects that in interpreting
25 timely, this Board has to use a reasonableness standard. Now
26 there's case law in this jurisdiction which was cited in my

1 motion to say -- this says 60, two months, even 32 days is
2 reasonable.

3 However, there's also case law that says 127,
4 14 months and even one year is not reasonable and therefore it
5 is untimely. Here, in this case, we have three years between
6 the decision and the appeal.

7 Now again, the word "timely" I believe is used
8 to give this Board discretion, I believe. In the discretion,
9 the Board will find that three years is not a timely time to
10 file an appeal. There's a case that I cite from Utah and I
11 cite that just specifically regarding the uniqueness of
12 zoning. Because of the uniqueness of zoning, there has to be
13 time limits on appeals.

14 That case is the Lund case which I cited and I
15 quote them. They say, "The purpose for a time limit in
16 appeals is to assure expeditious and orderly development of
17 the community." Now as I cited, there's policy reasons that
18 this Board, aside from legal factors, there's also policy
19 reasons that this Board should not accept these appeals. This
20 could set a dangerous precedent. You can have people coming
21 in with 3, 5, 10 years -- since they believe they were
22 aggrieved in a decision from the DCRA or other zoning
23 authority and come to this Board.

24 Additionally, I would like the Board to review
25 some of the facts in this case. The zoning laws have changed.
26 They were denied under one set of laws and regulations and

1 when they realized that they either didn't like the new laws
2 or for some reason it was convenient for them, they decided to
3 appeal and that time was three years later.

4 Lastly, I would like the Board to look at Waste
5 Management's Opposition. They filed an Opposition to our
6 Motion to Dismiss in this case and really, the only issue that
7 they bring up is that the Government contributed to the delay
8 and they're filing the appeals.

9 However, if you read the letter, the letter
10 does not deal with their 1995 C of O applications. Their
11 letter is dated -- I'm sorry, that letter from DCRA is dated
12 May 22, 1996 and this is the only proof that they have of any
13 governmental delay. If you read this letter, this is dealing
14 with their application for interim permit to operate, not a
15 certificate of occupancy.

16 So this letter is not connected with a 1995
17 applications at all. They're talking about new regulations
18 and the letter refers them to file a new certificate of
19 occupancy. Waste Management when they even filed that new
20 application in 1996, they did not even attempt to reserve
21 their rights for the 1995 case. They didn't reserve their
22 appellate rights at that time.

23 Additionally, the District of Columbia feels
24 that is prejudiced if this case would go forward. It's been a
25 three year time period and this is the city government.
26 There's a lot of turnover and the District has had problems

1 locating witnesses. Many witnesses have left the D.C.
2 Government and so there's evidence that's been hard to locate
3 and witnesses that have been impossible to find in this three
4 year time period.

5 Lastly, I'd just like to mention, Waste
6 Management in their Opposition mentioned the doctrine of
7 latches. I'm not sure why it's mentioned. It's not mentioned
8 in our application whatsoever. We don't believe it has any
9 applicability in this case and the only two cases that Waste
10 Management cites to, new cases that they cite to are I believe
11 a New Jersey and a Florida case, deal with the doctrine of
12 latches and those cases do not even deal with a timeliness or
13 the reasonableness interpretation.

14 Thank you.

15 MR. WILSON: Members of the Board, Andrew
16 Mishkin is going to address this Motion to Dismiss issue on
17 behalf of Waste Management.

18 MR. MISHKIN: Members of the Board, my name is
19 Andrew Mishkin representing Waste Management. As you have
20 heard, Corporation Counsel has not argued that there is a
21 fixed period of time that applies to whether this appeal is
22 timely. The standard of reasonableness essentially means that
23 this Board can and should do what is right and what is fair to
24 the parties. In that case, it is very clear that what is
25 right and what is fair is to deny this Motion to Dismiss and
26 to grant the Waste Management appeal.

1 There are unique circumstances in this case and
2 those unique circumstances make clear why the appeal was filed
3 when it was and in addition, Mr. Eubanks mentioned the concern
4 about the possibility about a dangerous precedent being set
5 that would allow appeals to be filed after a long time. Those
6 unique circumstances of the case that justify this appeal, the
7 timing of this appeal, I think mean that it would not set a
8 dangerous precedent.

9 The only precedent that would be set is that if
10 the District Government essentially lures an Applicant down a
11 road of delay when the Applicant wants to pursue its rights
12 under the zoning laws, then the District Government should be
13 held accountable for that delay when the Applicant decides
14 that the District Government is no longer proceeding in a
15 rational manner that will result in a fair resolution.

16 In this case, no one has gone out and built a
17 building that will now have to be torn down. No one has done
18 anything differently than would have been done if Waste
19 Management had filed its appeal in 1996. In fact, the status
20 quo has been maintained since 1995. As promised by DCR, the
21 Waste Management facility has continued to operate, although
22 Waste Management has been put to great trouble and expense by
23 DCRA's ever-changing rules and procedures in this case.

24 In short, no one has been prejudiced by the
25 timing of this appeal except Waste Management. It is almost
26 bizarre that after DCRA practically begged Waste Management to

1 file a certificate of occupancy application in 1995 for a
2 solid waste handling facility, this by the way being the first
3 application for a certificate of occupancy that explicitly,
4 openly and honestly stated that the use was for a solid waste
5 handling facility.

6 It's almost bizarre that after DCRA practically
7 begged Waste Management to file that C of O application and
8 Waste Management complied, then DCRA specifically in 1996 in
9 that letter Mr. Eubanks referred to, did not just address the
10 interim permit. In that 1996 letter the DCRA specifically
11 instructed Waste Management that it had to file a new
12 certificate of occupancy application.

13 Now that letter was attached to Waste
14 Management's opposition to the Motion to Dismiss as Exhibit A
15 and if the Board will indulge me for just a moment, I'd like
16 to read from that letter so that the record is clear.

17 What that letter to Waste Management said was
18 and I quote: "In addition, the interim operating permit will
19 require Waste Management to apply for a solid waste handling
20 facility certificate of occupancy with an accompanying
21 external effects statement. This must be done within 30 days
22 of issuance of the interim operating permit.

23 As a procedural matter because the Zoning
24 Administrator has determined that solid waste handling
25 facilities must be approved by the Board of Zoning Adjustment,
26 Waste Management's certificate of occupancy application will

1 automatically be denied. The BLRA will advise Waste
2 Management to apply for a variance.

3 The company will then have an additional 30
4 days to apply for a variance with the BZA. If Waste
5 Management does not seek BZA approval within the required time
6 or the BZA denies the company's variance application, the
7 Department will propose the deny the company's application for
8 a solid waste handling facility permit."

9 Now I ask the Board, is this letter only about
10 the interim permit or is it about a certificate of occupancy?

11 In addition, the letter went on to say and it's
12 important to note for this proceeding, "While Waste
13 Management's solid waste handling facility certificate of
14 occupancy application is pending before the BZA, the
15 Department will allow the company to operate the solid waste
16 handling facility at its application address so long as the
17 company is in compliance with the terms of the interim
18 operating permit and all other laws and regulations governing
19 solid waste handling facilities."

20 Now it was based on this May 1996 letter, a
21 letter which Waste Management received at the time that it was
22 preparing to file its appeal in response to the February 1996
23 denial that Waste Management determined that it was
24 appropriate and necessary to file that second certificate of
25 occupancy as instructed by DCRA and that at that time filing
26 an appeal of its 1995 action could result in DCRA's taking

1 action to shut down the facility and would involve the expense
2 and confusion of an additional proceeding and that is why
3 Waste Management did not at that time go forward with the
4 appeal of the 1995 certificate of occupancy application.
5 Instead, relying in good faith on the affirmative instructions
6 of DCRA, after Waste Management's operating permit, interim
7 operating permit was issued, Waste Management filed a second
8 certificate of occupancy application in September of 1996.

9 Now I am not going to take the Board's time
10 with a detailed chronology of the events that followed, but it
11 is important to note that it took over 8 months for DCRA to
12 respond to that second certificate of occupancy application by
13 denying it and at that point they changed the rules in the
14 middle of the game and instead of saying seek a variance, they
15 said DCRA specifically instructed Waste Management to seek a
16 special exception from the BZA under the zoning regulations
17 that had been proposed, but not finalized. Mind you, this is
18 in the spring of 1997.

19 Waste Management argued with DCRA that it was
20 inappropriate to seek a special exception from the BZA under
21 proposed regulations, but DCRA insisted that Waste Management
22 go forward with that application for special exception.

23 And in July of 1997, Waste Management tendered
24 that application for special exception. Fortunately, common
25 sense prevailed and the Office of Zoning rejected that filing,
26 refused to even allow that filing to come before the Board

1 based on the fact that it was a special exception application
2 on zoning regulations that were proposed and not yet
3 finalized.

4 Now Waste Management at that time informed DCRA
5 and this was confirmed in writing that it was not going to
6 proceed further with any action on a certificate of occupancy
7 until DCRA worked out an appropriate procedure process and
8 rules that would not be changed and gave Waste Management
9 explicit instructions.

10 And DCRA never refused to acknowledge that
11 position. DCRA did not deny Waste Management's position on
12 that issue. In fact, DCRA never gave written instructions to
13 Waste Management and instead in April and May of 1998
14 immediately after the zoning text amendments were adopted,
15 issued citations to Waste Management alleging that Waste
16 Management was operating without a proper certificate of
17 occupancy.

18 Now Waste Management assumed that those
19 citations were issued in error and it is very important for
20 the Board to know that Waste Management was not even aware of
21 those citations until September of 1998. That's just 10
22 months ago. I'm sorry, 12 months ago.

23 Now Waste Management sought to resolve those
24 citations for operation without a proper certificate of
25 occupancy with DCRA and at the hearing on those notices of
26 infraction, the hearing officer instructed the parties to take

1 an extra month before submitting their post-hearing briefs to
2 attempt to settle that matter and it was only in January of
3 1999, January of this year, that DCRA made clear that it was
4 not going to settle or withdraw the notices of infraction for
5 operation without a certificate of occupancy.

6 It was only at that time that Waste Management
7 realized that the procedures that were being proposed and
8 followed by DCRA would never result in any resolution of the
9 certificate of occupancy issues and that it was no longer
10 appropriate or fair for Waste Management to seek a special
11 exception, but instead Waste Management filed in February,
12 within 30 days of realizing what DCRA's true position was,
13 filed in February of 1999 the appeal that is now before this
14 Board.

15 Under the applicable cases then, we believe and
16 we believe the most relevant case is the Gotto case, 423 A.2d
17 917, that not only the number of days is important, but
18 whether the party that is filing the appeal has been pursuing
19 administrative remedies in the interim. And in this case it
20 is clear that Waste Management has not been sitting on its
21 rights.

22 Waste Management has been essentially standing
23 on its head and doing backflips, pursuing administrative
24 remedies, attempting to obtain a certificate of occupancy and
25 only when it became clear that the procedures proposed by DCRA
26 were completely futile, did Waste Management revert to the

1 appeal of its 1995 certificate of occupancy application.

2 Under the circumstances, we believe it would be
3 absolutely unjust and unfair for this Motion to Dismiss to be
4 granted and we respectfully request that the Board deny the
5 motion and allow this appeal to go forward.

6 If there are any questions, I'd be happy to
7 answer them.

8 CHAIRPERSON REID: Thank you.

9 VICE CHAIR KING: Madam Chair, I think that
10 both parties have made very clear what their position is on
11 the Motion to Dismiss. I would like to hold it in abeyance and
12 proceed with the case and rule on the Motion to Dismiss at
13 some subsequent date.

14 MR. GILREATH: I second the motion.

15 CHAIRPERSON REID: All in favor.

16 ALL: Aye.

17 CHAIRPERSON REID: All opposed?

18 MS. PRUITT-WILLIAMS: Staff will record the
19 vote as 5 to 0 to hold in abeyance the decision on dismissal.
20 The motion was made by Ms. King and seconded by Mr. Gilreath.

21 CHAIRPERSON REID: Other preliminary matters?

22 MR. WILSON: Yes, Your Honor. I consider this
23 a minor matter, but one --

24 MS. PRUITT-WILLIAMS: Excuse me, Mr Wilson --

25 MR. WILSON: Forgive me. I consider this a
26 minor matter, but one worth making before this Board. We wish

1 to object to the Corporation Counsel being allowed to file a
2 supplemental statement on September 14, 1999.

3 As this Board will recall at our earlier
4 hearing, I thought in the interest of resolving this matter
5 and getting it handled efficiently, departed from its usual
6 rules and set a briefing schedule. I believe the initial
7 briefs were due August 20th and all response briefs were due
8 September 13th. And our brief had already been filed. My
9 recollection would be the Corporation Counsel that sought an
10 extension of time and we stood by that initial brief and their
11 filing was made on August 20th, their initial filing.

12 Our response brief was timely filed and theirs
13 was not filed until the 14th which is late and very simply it
14 seems to me the rules should apply fairly and they should
15 apply across the Board. And we simply ask that this Board
16 take action as appropriate with respect to this late filing of
17 the response brief.

18 VICE CHAIR KING: What do you consider to be
19 the appropriate action?

20 MR. WILSON: Well, I wouldn't dare --

21 VICE CHAIR KING: Why not? You're asking us to
22 do it. Tell me what you want us to do.

23 MR. WILSON: That the brief should be struck
24 and not considered.

25 CHAIRPERSON REID: All right, what is the date
26 of the --

1 MR. WILSON: Yes ma'am, I believe the
2 submission was made on the 14th. My understanding, based upon
3 the order of this Board previously is that it was due on the
4 13th.

5 CHAIRPERSON REID: Specifically, which --

6 MR. WILSON: I'm sorry, excuse me, ma'am, let
7 me be more specific. I'm referring to a document that they
8 called a Supplemental Statement.

9 CHAIRPERSON REID: Do you have it -- okay, we
10 don't seem to --

11 VICE CHAIR KING: Yes, we do. Here it is.

12 CHAIRPERSON REID: We do?

13 VICE CHAIR KING: It was clocked in on
14 September 14th.

15 CHAIRPERSON REID: What does it say? Does it
16 say a supplement?

17 VICE CHAIR KING: District of Columbia's
18 Supplemental Response to Waste Management of Maryland, Inc.'s
19 Statement of the Applicant.

20 CHAIRPERSON REID: I see, okay. All right --

21 MS. PRUITT-WILLIAMS: Madam Chair, I have to
22 say the transcript says here on page 54 of the July 7th
23 hearing that it sets the time of the hearing for the 22nd and
24 that all submissions should be in no later than September
25 16th.

26 MR. WILSON: That was actually, that was only

1 part of the order. The original order was that the initial
2 briefs were due on the 20th. The response briefs were due on
3 the 13th and if there were briefs by other parties, they were
4 due on the 16th, but the briefs to be submitted by the parties
5 to the case as it then existed were due on August 20th and
6 September 13th.

7 CHAIRPERSON REID: Mr. Wilson, when you
8 stipulate that other briefs could be submitted up the 16th,
9 you're referring other than from the parties in the case?

10 MR. WILSON: Yes ma'am. I think at that point
11 this Board was contemplating that it was possible that there
12 might be other parties that may intervene or wish to become
13 involved and that they too might be able to file something on
14 the 16th.

15 CHAIRPERSON REID: Excuse me, one second.
16 That's rather atypical of how we commonly operate. Typically
17 we have a time line and everyone should be in compliance with
18 that particular time line. I can't understand a situation
19 where there are exceptions made after a date certain to allow
20 additional submissions. You're saying -- is that what you
21 understood us to have done at that time?

22 MR. WILSON: Ms. Cross Reid, I agree with your
23 point and in fact, I wrote a letter to Mr. Bastida dated July
24 30th to confirm the dates and the schedule.

25 MS. PRUITT-WILLIAMS: Okay, in reading further
26 in the transcript it does back that, it says August 13th.

1 August 20th for initial submission, this is for Mr. Parker.
2 I'm reading from page 56 right now.
3 Let me start a little bit up higher. They're
4 talking about the hearing. "Chairman Reid: The 22nd?" And
5 Mr. Parker says, "The 22nd?" Mr. Parker: "Okay, so that does
6 it. The Board feels it has enough time to review the
7 documents or do they want us to move to final responses back?"
8 "Say that again, please, August what?" "August 20th for the
9 initial submission." Mrs. King: "Okay, then."
10 I can copy this for everybody so she can read
11 it.
12 CHAIRPERSON REID: What is this -- I'm not --
13 MS. PRUITT-WILLIAMS: No, I'm sorry, September
14 13th is the deadline is what it says here. Mr. Parker says,
15 "No, I'm sorry, September 13th. So September 13th for
16 submission and September 22nd for the hearing."
17 CHAIRPERSON REID: Where does the date
18 September 16th come from? Is that reflected in --
19 MS. PRUITT-WILLIAMS: That was earlier and it
20 was changed. The conversation went on and it was revised to
21 the 16th. I mean 13th.
22 MR. WILSON: So I stand corrected, Ms. Reid.
23 It sounds like it is precisely what you suggested, that the
24 initial briefs would have been due the 20th of August and any
25 response would have been due the 13th of September and that
26 you all, in fact, followed your typical policy and did not

1 make an exception for any briefing beyond that. So I
2 certainly accept what Ms. Pruitt-Williams --

3 CHAIRPERSON REID: Right, what it sounds like,
4 are you representing the --

5 MS. PRUITT-WILLIAMS: Excuse me, just for --

6 CHAIRPERSON REID: Let me get their response,
7 Ms. Pruitt-Williams and we'll try to make some sense out of
8 it.

9 MS. RAY: Excuse me, Madam Chairperson. I'm
10 Venita Ray.

11 CHAIRPERSON REID: Is your mike on?

12 MS. RAY: Venita Ray from the Office of
13 Corporation Counsel and I'd like to just respond to that. We
14 are aware of what the briefing schedule was. There are only
15 supplemental, the reason for a supplemental was only to expand
16 on our initial arguments. We were aware that the Board was
17 receiving these documents at least a week before the hearing.
18 We feel that -- we checked your rules. There were no rules
19 that spoke to this.

20 The fact that we could not or what we had to
21 file and we also feel that no one was prejudiced by the
22 initial filing. It only expanded on what we had initially
23 filed and we intended to file it on the date, the last date
24 for responses and for some reason was not able to do that.

25 So in our mind it was just one day late of any
26 submission date and we just submit that the Board accept the

1 filing and it only expanded on our initial arguments that we
2 made in our initial filing and that no one was prejudiced and
3 that we were not in violation of any of your rules by seeking
4 to expand on our argument.

5 MR. WILSON: We just -- I have a great deal of
6 respect for counsel and our point here, we just had a
7 significant argument on a Motion to Dismiss about deadlines
8 and dates and timeliness.

9 Here, in that instance, it was admitted by all
10 parties there's no explicit time period by which an appeal
11 should be made. Here, before this Board, this Board very
12 carefully stated what the deadline was going to be.

13 CHAIRPERSON REID: All right, Mr. Wilson, I
14 think your point is well made.

15 Board Members, I would move that we not allow
16 the supplemental submission to come into the record in that it
17 was submitted after the true submission date and also Corp.
18 Counsel has stated that they were well aware of the fact that
19 it was late and that it was an expansion on the argument that
20 they had already submitted.

21 COMMISSIONER HOOD: Madam Chair, do we normally
22 -- does the BZA normally waive the rules on certain occasions
23 like this?

24 VICE CHAIR KING: Very frequently, very
25 frequently.

26 CHAIRPERSON REID: To my knowledge, there's

1 been no request for that.

2 COMMISSIONER HOOD: I would concur -- I would
3 hope that we would be consistent as a Board.

4 MS. PRUITT-WILLIAMS: Madam Chair, I believe
5 that's actually what was asked of right then.

6 MS. RAY: Excuse me, just one final note.
7 That's what our motion was requesting. We submitted our
8 supplemental filing with a motion to request permission --

9 CHAIRPERSON REID: I'm sorry, I didn't see that
10 request for a waiver.

11 MS. RAY: It was all in one document.

12 CHAIRPERSON REID: Okay.;

13 MR. WILSON: Ms. Reid Cross, may I be heard
14 very briefly?

15 CHAIRPERSON REID: Uh-huh.

16 MR. WILSON: In the years that I've been
17 practicing whenever another counsel has asked me for
18 additional time, I have never once refused because I have had
19 instances -- this was a situation where a request was not
20 made.

21 What I will say is that ultimately we really
22 wish this issue to be heard on the merits, so at this point
23 we're prepared to withdraw this --

24 CHAIRPERSON REID: Objection.

25 MR. WILSON: Let the brief be read, let it be
26 heard. Let's have at it.

1 CHAIRPERSON REID: Okay. I would concur. I
2 was not aware of the fact that there had even been a request
3 and so based on that, I was basically taking the harder line,
4 but if you feel comfortable with it and you have no objection,
5 then certainly we can move forward with it.

6 MR. WILSON: We're ready.

7 CHAIRPERSON REID: Thank you. Preliminary
8 matters?

9 MR. GILREATH: We need the motion that we
10 accept it beyond one day late.

11 CHAIRPERSON REID: We can just waive the
12 record. Just by consensus we can just waive the record to
13 accept it one day late.

14 MR. GILREATH: All right.

15 CHAIRPERSON REID: Yes?

16 MR. RALSTON: Madam Chairman, Members of the
17 Board, I'm David Ralston of the law firm of Hopkins and
18 Sutter, representing Custom Machinery Company, one of the
19 affected parties by the proposed appeal. We filed a motion to
20 intervene and ask that that motion be granted so we could
21 participate in the proceeding.

22 We filed a one page motion, paper in support of
23 the motion to dismiss. I'll rest on the papers in that
24 regard. We were not participants at the prior hearing. We
25 were unaware of the deadlines that I've just heard discussed
26 here.

1 CHAIRPERSON REID: You are asking for party
2 status?
3 MR. RALSTON: I'm sorry?
4 CHAIRPERSON REID: Are you requesting party
5 status?
6 MR. RALSTON: Yes ma'am.
7 MS. PRUITT-WILLIAMS: Could you repeat your
8 name again and who you represent?
9 MR. RALSTON: David Ralston, R-A-L-S-T-O-N.
10 Hopkins and Sutter and the party we represent is Custom
11 Machinery Company, Inc. on Adams Place.
12 MS. PRUITT-WILLIAMS: Thank you.
13 CHAIRPERSON REID: In your submission you, I
14 think you indicated that your client is a business within 200
15 feet of the subject property?
16 MR. RALSTON: Yes ma'am.
17 CHAIRPERSON REID: The Applicant's property.
18 And typically, we ask how -- when you request party status, we
19 need to know how is it that your party, your client's concerns
20 or how is it that your client is more aggrieved than any of
21 the other property owners or the businesses within 200 feet of
22 the subject property such that it could not be addressed
23 through your ANC?
24 MR. RALSTON: In short, Madam Chair, our
25 client's property is immediately adjacent to the proposed
26 facility and in fact, is bounded. If you consider the access

1 road, actually on three sides by the proposed -- by the
2 current facility of which is subject of the appeal, so we're
3 perhaps, I think, fairly stated the most affected property
4 that is involved in the application in the appeal.

5 CHAIRPERSON REID: Board Members?

6 VICE CHAIR KING: It seems to me that he should
7 be granted party status or his client should be granted party
8 status. Surrounded on three sides by the facility in
9 question, I think, is --

10 CHAIRPERSON REID: Adequate.

11 VICE CHAIR KING: More than.

12 COMMISSIONER HOOD: I'll second that.

13 CHAIRPERSON REID: All right. All in favor?

14 ALL: Aye.

15 CHAIRPERSON REID: Opposed.

16 MR. WILSON: Your Honor, I just want to state
17 for the record we would object to an intervention at this
18 time. This has hardly been a matter of which this particular
19 business has been unaware of and again we have someone getting
20 involved here at the 13th hour.

21 I've stated my objection. Thank you.

22 CHAIRPERSON REID: Thank you.

23 COMMISSIONER HOOD: Madam Chair?

24 CHAIRPERSON REID: Yes.

25 COMMISSIONER HOOD: I'll wait and let them do a
26 disclosure here.

1 MR. SCHULMAN: Madam Chair, my name is Jim
2 Schulman and I'm here representing the Citizens Against Trash
3 Transfer Stations. I submitted a document on July 7th after
4 your body had departed the room, so I'm not sure if we're
5 accorded party status or not. We would very much appreciate
6 to be considered a party in the case, especially given the
7 fact that the ANC may not have been able to get their act
8 together and we represent citizens in the District of Columbia
9 who are affected by trash transfer stations.

10 CHAIRPERSON REID: You were here when we had
11 the previous --

12 MR. SCHULMAN: And I submitted a document to
13 the desk.

14 CHAIRPERSON REID: Requesting party status?

15 MR. SCHULMAN: Not knowing whether we were a
16 party or not, I did not at that time request party status.
17 That's why I'm here asking today for that.

18 CHAIRPERSON REID: And you're requesting party
19 status predicated upon the fact that you are a citizen's
20 group?

21 MR. SCHULMAN: Yes. We are a group that
22 includes people who -- from all, throughout the District who
23 are impacted directly by trash transfer stations.

24 CHAIRPERSON REID: And your position with the
25 group?

26 MR. SCHULMAN: I'm one of the steering

1 committee members.

2 CHAIRPERSON REID: Are you authorized to
3 represent the group?

4 MR. SCHULMAN: Yes.

5 VICE CHAIR KING: Do we have that in writing?

6 MR. SCHULMAN: I don't have it in writing, but
7 one of the other steering committee members works here in this
8 building. I could drag him down here if you like.

9 VICE CHAIR KING: Madam Chair, you will be
10 permitted to testify and will be given time in which to state
11 your opinion. I don't see that it's necessary that this group
12 which is city-wide should have party status and the right to
13 cross examine. You will be able to make a statement.

14 CHAIRPERSON REID: Testify --

15 VICE CHAIR KING: I don't see any statement
16 from this gentleman.

17 CHAIRPERSON REID: I haven't.

18 COMMISSIONER HOOD: I thought there was
19 something in there earlier, but my concern is I want to make
20 sure and I think the concern is they want -- they have
21 questions and one way we can resolve that, trying to be fair
22 to both sides across the Board is that if they ask the
23 questions to us now, I think that's what he's coming up here
24 for.

25 CHAIRPERSON REID: Well, the ANC
26 representative.

1 COMMISSIONER HOOD: Right --

2 VICE CHAIR KING: Do they have an ANC

3 representative here today?

4 COMMISSIONER HOOD: They have a letter in the

5 file.

6 CHAIRPERSON REID: Yes, but is there someone

7 here to testify on behalf of the ANC today?

8 MR. SCHULMAN: Precisely because of their

9 absence that I offered my speech.

10 VICE CHAIR KING: Mr. Hood, I understand where

11 you're coming from. But I think that we really need to have

12 somebody -- if we start granting party status to an individual

13 who purports to -- and I'm not doubting your word, but I mean

14 we have no --

15 MR. SCHULMAN: We've testified before the BZA

16 in other cases.

17 VICE CHAIR KING: But you're saying you're the

18 official representative. I don't have in my file any

19 information about you and your organization.

20 COMMISSIONER HOOD: Ms. King, I don't mean to

21 cut you off. Ms. King, like I was saying, I really wasn't

22 making a decision on that one way or the other, but I was just

23 trying to expedite the process and let him know that he can

24 ask questions. I think that's what he's trying to go at. He

25 can ask questions through us to the Board and then that way if

26 he doesn't get party status, he'll still have his five

1 minutes.

2 CHAIRPERSON REID: Sir, you need to give it to
3 the staff, please.

4 COMMISSIONER HOOD: He'll still have his five
5 minutes to do his presentation and that way we don't have to
6 prolong it.

7 VICE CHAIR KING: Or if he's representing an
8 organization, he'll have 10 minutes.

9 And he can raise questions then which we can
10 then --

11 COMMISSIONER HOOD: Right, and that was my
12 point, exactly.

13 VICE CHAIR KING: But I don't think party
14 status is supported.

15 CHAIRPERSON REID: Okay, I think the Board
16 Members have determined that in your instance we can certainly
17 -- you have the right to testify on behalf of the organization
18 with regard to this application and whatever concerns you may
19 have could be posed to us so that we could then make sure that
20 they address to the applicant or to the party that you wish to
21 have them addressed and that would be in lieu of the party
22 status that you're requesting. Thank you.

23 MR. WILSON: Ms. Cross Reid, very briefly, we
24 do not wish to add any further as to how the Board has chosen
25 to address this. I did want to follow up on what Ms. King had
26 suggested. We did have an opportunity to take a look at the

1 exhibit log. We have not received or been served with a copy
2 of any document, July 7th or any point, nor do we find one in
3 the exhibit log from this organization.

4 CHAIRPERSON REID: Okay.

5 COMMISSIONER HOOD: Madam Chair, I'd like to do
6 a disclosure again. I have worked with Waste Management and
7 the community in another capacity as President, Woodbridge,
8 and now I'm in this capacity, I have dissolved all my
9 relationships in dealing with Waste Management in helping set
10 up community liaison peace. I spent some time, I feel that my
11 position previously will not affect my decision at this point
12 in time and this is the second time I've done a disclosure.

13 CHAIRPERSON REID: Okay, are there any
14 objections to Mr. Hood sitting on this case? If not, then we
15 would proceed.

16 MS. PRUITT-WILLIAMS: We will have a couple
17 more preliminary issues, I believe.

18 MS. RAY: The District has one other
19 preliminary matter.

20 MR. WILSON: Excuse me, I just wanted to state
21 we -- Waste Management has no objection to Mr. Hood being
22 there. Excuse me, Ms. Ray.

23 MS. RAY: That's all right. We have one other
24 preliminary matter. It is our understanding that the typical
25 way that the Board does business when they're dealing with an
26 Agency matter is that the Agency representative sits, I

1 assume, up on the dais and their attorney sits up on the dais.

2 This is our first time here, so please correct us.

3 What we would like, even if that's the normal
4 procedure, if we could depart from that. We are representing
5 the Agency in this matter, the Office of Corporation Counsel
6 and would like to not sit on the dais and would like the
7 opportunity to have the Agency representative close to us so
8 that we can make comments or he can advise us when he hears
9 something if there's something we need to be concerned with
10 and that if the Board still chooses a need to have to speak to
11 Mr. Johnson or ask him questions that we first be afforded the
12 opportunity to conduct a direct examination and then the Board
13 can ask any questions that it wishes of Mr. Johnson as the
14 Agency representative.

15 CHAIRPERSON REID: Is that okay? All right, we
16 have no objections --

17 MR. WILSON: Your Honor, we have an objection.
18 Excuse me, forgive me for calling you Your Honor, Madam
19 Chairperson, but I mean respect in all ways, Madam
20 Chairperson, our concern is that this person cannot be an
21 advocate. He is a fact witness, period.

22 CHAIRPERSON REID: Who cannot be an advocate?

23 MR. WILSON: Is it Mr. Johnson? Right.

24 MS. PRUITT-WILLIAMS: Zoning Administrator.

25 MR. WILSON: Yes.

26 CHAIRPERSON REID: An advocate.

1 MR. WILSON: If he is in this position where he
2 is working with them in the presentation, in the actual
3 presentation of their case, I have no problem with physically
4 where someone sits, but he's not an advocate. The advocate is
5 -- the advocates are Ms. Ray and Mr. Eubanks.

6 MR. BASTIDA: Excuse me, Madam Chairperson.
7 The appeal is to the decision of the Zoning Administrator, so
8 you cannot exclude the Zoning Administrator from the process.

9 MR. WILSON: We don't wish to exclude him. We
10 just want him to be a witness.

11 CHAIRPERSON REID: He will be a witness.

12 MR. BASTIDA: He is a witness and he's included
13 in the system by you appealing his decision.

14 MR. WILSON: Correct, but he doesn't have to be
15 coached while we're having the hearing.

16 MR. BASTIDA: He's represented by legal counsel
17 and he has the right to have his legal counsel provide him the
18 information necessary.

19 CHAIRPERSON REID: Typically, they would sit
20 here, but the only thing -- Mr. Wilson, the only thing they're
21 asking is rather than they coming up here, that they're asking
22 that Mr. Johnson be allowed to sit there which we have no
23 problem with.

24 MR. WILSON: All right.

25 CHAIRPERSON REID: There's nothing atypical.
26 That is what we normally do when we have appeal cases that

1 affect -- to have a case involving the Zoning Administrator.

2 MR. WILSON: And Ms. Cross Reid, I respect your
3 point. I respect the Board's point. I defer to your
4 judgment.

5 CHAIRPERSON REID: All right, so where is he?

6 MS. PRUITT-WILLIAMS: Also, Madam Chair, just
7 for the record, on the agenda it states that there will be an
8 application also heard today and that has been postponed. I
9 just wanted -- in case someone is here for that application.
10 Postponed indefinitely.

11 MR. WILSON: That's the special exception
12 hearing?

13 MS. PRUITT-WILLIAMS: Exactly.

14 CHAIRPERSON REID: Ms. Pruitt-Williams,
15 basically state the number, the case number --

16 MS. PRUITT-WILLIAMS: Yes, Case No. 16453 is
17 postponed indefinitely at this point, probably to some time
18 next time.

19 CHAIRPERSON REID: That's the special exception
20 case.

21 MR. WILSON: For what party?

22 MS. PRUITT-WILLIAMS: It's for the Case No.
23 16453, Application of Caslin and Associates for special
24 exception on behalf of Waste Management.

25 It's the very last case on the agenda, that's
26 hopefully over there by the door for you.

1 CHAIRPERSON REID: Okay, does that conclude the
2 preliminary matters, hopefully.

3 One other preliminary matter we want to get out
4 of the way and that is basically to kind of set a time line
5 for the proceeding today. The Board Members in Executive
6 Session discussed these two appeals and what we would like to
7 see is that they be combined, the case be combined as one case
8 for presentation and it will be voted on separately, but
9 rather than basically presenting one case and then the other
10 case when I think the merits of the case primarily are very
11 similar, that you could just stipulate in your presentation
12 when it pertains to which appeal and that way we can certainly
13 expedite and save a lot of time rather than going through the
14 same procedure twice.

15 And when we deliberate we will definitely vote
16 on each case separately on its own merits, if there's no
17 objection. This is how we'd like to proceed.

18 MR. WILSON: We have no objection.

19 MS. RAY: No objection.

20 CHAIRPERSON REID: Okay, the time line, how long
21 do you anticipate your case taking, Mr. Wilson?

22 MR. WILSON: Ms. Cross Reid, we think our case
23 will take just over an hour to present.

24 CHAIRPERSON REID: Okay. Witnesses and
25 everything?

26 MR. WILSON: Yes ma'am.

1 CHAIRPERSON REID: Okay.

2 MR. WILSON: And everything.

3 CHAIRPERSON REID: That's fine. All right.

4 And the Government?

5 MS. RAY: The Government estimates an hour and
6 a half to two at the max. It may not be that, but it's kind
7 of hard to estimate.

8 CHAIRPERSON REID: Can you try to keep it like
9 within an hour, hour and a half, if in fact --

10 MS. RAY: Sure.

11 CHAIRPERSON REID: -- the Applicant is able to
12 condense their presentation to an hour, then we'd like to try
13 to have it equal so that if -- it's okay, if it's a little bit
14 more, but not twice as long.

15 Let me also tell you that much of the material,
16 all of the material that I've read, and it's a voluminous
17 amount of material and we've spent considerable time reading
18 it, pouring over it, so we are very familiar with the case
19 itself, so in the presentation basically what we need from you
20 is to hit the highlights and to give us the things that you
21 feel are most important and most pertinent in your
22 presentation today.

23 MS. RAY: Okay.

24 CHAIRPERSON REID: Okay, now for witnesses --
25 okay, parties in the case shall have is it 10 minutes?

26 MS. PRUITT-WILLIAMS: Generally, yes, 10

1 minutes. Ten minutes for parties, excuse me.

2 CHAIRPERSON REID: Ten minutes for parties.
3 Fifteen minutes for ANC and 5 minutes for individual testimony
4 from witnesses, either in opposition or in support.

5 MR. WILSON: I want to make certain I
6 understood how that would work.

7 CHAIRPERSON REID: All right.

8 MR. WILSON: We quite frankly are -- our direct
9 case, which I indicated would take approximately an hour is
10 going to be presented through the President of the Division of
11 Waste Management that operates here. And he will be making a
12 presentation describing how our operation works, etcetera, and
13 that will take approximately one hour, so as an individual
14 witness he would be on for longer than 10 minutes.

15 CHAIRPERSON REID: He's not -- no, in that
16 segment that is the presentation.

17 MR. WILSON: Yes ma'am.

18 CHAIRPERSON REID: And then later we'll have
19 individual witnesses.

20 MR. WILSON: Forgive me.

21 CHAIRPERSON REID: That will come forward to
22 testify either in support or in opposition to the application.

23 MR. WILSON: Thank you, Ms. Cross Reid, I
24 appreciate the clarification.

25 MS. RAY: Excuse me, one final understanding
26 from you, so the 10 minutes refer to other witnesses that were

1 not the party or the Government, is that correct?

2 CHAIRPERSON REID: Correct.

3 MS. PRUITT-WILLIAMS: Correct, if an individual
4 wanted to testify.

5 MR. GILREATH: Madam Chair, is the time line,
6 does that include cross examination, this hour?

7 CHAIRPERSON REID: No.

8 MR. GILREATH: So we have to add additional
9 time.

10 CHAIRPERSON REID: We will add additional time
11 for cross examination which usually entails quite a bit of
12 time, however, we ask that in this instance we have some
13 assurance that it will go a lot smoother and a lot more
14 expeditiously because of the fact that we have two attorneys
15 who are very familiar with procedures and they know exactly
16 how, what and when and we feel that that would certainly help
17 to -- help keep things moving along quickly.

18 So why don't we start now with the Applicant --

19 MR. BASTIDA: Madam Chairperson, may I
20 interrupt you?

21 CHAIRPERSON REID: Yes.

22 MR. BASTIDA: The standard procedure is to
23 people who are going to testify to sit at the table, turn
24 their microphone on and then after they finish testifying to
25 turn it off and then go back to their seats. Thank you.

26 CHAIRPERSON REID: All right, thank you, Mr.

1 Bastida.

2 All right, then are there any other issues or
3 any other preliminary matters before we begin that the Board
4 Members had?

5 All right, then why don't we proceed? What
6 we'll do is have the Appellant to give the presentation and
7 then we'll have lunch break and then we'll start the afternoon
8 with the Intervenor's case and the Government's presentation.

9 Thank you.

10 MR. WILSON: Good morning, I wanted to just
11 address Mr. Gilreath's point briefly. We do recognize that
12 this Board has already spent a significant amount of time
13 reading our submissions. It's obvious from the earlier
14 arguments. So it is our intention even in the cross
15 examination to try to limit the time that we spend in that
16 regard.

17 Mr. Bastida was explaining the procedure. My
18 back bothers me at times. Would the Board mind terribly if I
19 use the rostrum over there to speak from.

20 CHAIRPERSON REID: Sure, sure.

21 VICE CHAIR KING: As long as the mike is on.
22 Use these new mikes. They're really much better and much more
23 sensitive than that old one.

24 MR. WILSON: Thank you.

25 MR. SOCKWELL: If you need a Tylenol break, let
26 us know.

1 MR. WILSON: I appreciate the sympathy, thank
2 you, Mr. Sockwell.

3 Ladies and gentlemen, good morning. I'm
4 Benjamin Wilson. I'm with the law firm of Beveridge and
5 Diamond here in the District of Columbia, together with Mr.
6 Mishkin whom you've heard from previously who's with the firm
7 of Duane, Morris and Hecksher. We represent Waste Management
8 here today. We thank you for allowing us to go forward at
9 this time.

10 I would like to tell you briefly just how we
11 intend to present our case today to get on with it and we
12 don't expect it will take much more than an hour.

13 First, Mr. Mishkin is going to briefly present
14 legal arguments as to why we believe Waste Management was
15 entitled to a certificate of occupancy as a matter of right
16 based on its November 21, 1995 application. Mr. Mishkin will
17 also briefly address the name change, C of O at that time.

18 Next you will hear from Ron Adolph who's just
19 stepped out for a minute. He's the Division President of
20 Waste Management and he will explain to you how our facility
21 at Queens Chapel Road operates, what Waste Management's
22 involvement is with that site, what it's been over the last
23 several years and how we believe we comply with the laws of
24 the District of Columbia.

25 As you are very much aware, we're here to ask
26 you to grant Waste Management its certificate of occupancy.

1 As you will hear and as you no doubt already know from reading
2 our prehearing statement and other materials filed in the
3 record, Waste Management manages a solid waste handling
4 facility in the District.

5 It is located in a heavy commercial, light
6 manufacturing zone just north of New York Avenue and
7 Bladensburg Road, N.E. And I'd like to take a moment and show
8 one of the boards here that helps up orient us to the site. I
9 know a number of you are familiar with its location.

10 Here you see Queens Chapel Road and I would
11 hasten to add Mr. Adolph will orient you to New York Avenue
12 and Bladensburg Road, the major thoroughfares leading into
13 this area and here you see Adams Place and this is the
14 facility at 2160 Queens Chapel Road.

15 And I might add, if it's more convenient for
16 the Board, if you'd like me to move this closer, I'd be glad
17 to do that. And obviously, this board is available to you for
18 your inspection and review at any time.

19 As I mentioned Mr. Adolph is --

20 VICE CHAIR KING: Excuse me for interrupting,
21 the map that was just put up on the left, is that one of the
22 exhibits in your presentation?

23 MR. WILSON: Yes. We will introduce it at a
24 later point.

25 VICE CHAIR KING: Which exhibit is it, please?

26 MR. WILSON: It's Tab A.

1 VICE CHAIR KING: Okay, thank you. I've got.

2 MR. WILSON: No, thank you, Ms. King. Our case
3 today is really about Waste Management's uphill battle to
4 obtain a certificate of occupancy that we have vigorously and
5 legally pursued since the company first assumed management of
6 the facility in 1995. Stated simply, Waste Management has
7 been unfairly and inequitably treated.

8 We are here today to appeal today both
9 literally and figuratively for relief. On November 21, 1995,
10 Waste Management filed a certificate of occupancy application
11 for a carting and hauling terminal yard.

12 In our application, a copy of which can be
13 found in Exhibit E of our statement and let me have a copy of
14 our statement. I would ask the Board if they might take a
15 moment to look at -- this is our initial statement, the larger
16 brief. And Exhibit E has at the back of it the actual
17 application form. And that specifically stated that it was
18 for a solid waste handling facility. If I could beg your
19 indulgence and ask you to take a moment to turn to I think
20 it's lines 9 and 10 of the application and I know the writing
21 may be somewhat difficult to read.

22 It says "carting or hauling terminal or yard or
23 processing establishment, specifically, solid waste handling
24 facility for receipt, loading, connecting and transfer for
25 final disposal outside of the District of Columbia solid waste
26 and/or construction, demolition, debris, all materials

1 nonhazardous."

2 If it would be helpful, with your permission, I

3 would approach the bench and --

4 CHAIRPERSON REID: Please.

5 COMMISSIONER HOOD: Mr. Wilson, what is the

6 date on this C of O? What is the date of the application?

7 MR. WILSON: It's November 21, 1995 and Mr.

8 Hood, I'll stand back and if you tell me to come forward I

9 will and the bottom right hand corner you see 11 and 21 here

10 is blotted out.

11 COMMISSIONER HOOD: Let me just say for the

12 record, Madam Chair, and I don't want to hold up and I'm

13 looking in here and I don't have that one. This is what I

14 have.

15 MR. WILSON: Yes sir.

16 COMMISSIONER HOOD: Am I on the right page?

17 That was in the submission that I have. It's the last page in

18 E, I believe.

19 MR. WILSON: It sure is.

20 COMMISSIONER HOOD: I think there must be some

21 --

22 MR. WILSON: I apologize to you, Mr. Hood. I

23 don't believe your copy has the correct page. Might I give

24 you this one?

25 VICE CHAIR KING: Is this what we're looking

26 at?

1 COMMISSIONER HOOD: Commissioner King, that's
2 the wrong -- apparently something was omitted.

3 CHAIRPERSON REID: Could we get a copy? Could
4 you ask staff to make a copy so we're all on the same page,
5 we'll all have the same document because some people are
6 looking at something different.

7 Go ahead, Mr. Wilson, we'll get copies.

8 MR. WILSON: I think Mr. Hood can confirm that
9 I've accurately read that to the Board.

10 COMMISSIONER HOOD: Yes.

11 MR. WILSON: That was an attachment to a cover
12 letter related to our application dated November 21, 1995 and
13 the real point here is at the time we filed this application,
14 no company, no company that managed solid waste in the
15 District of Columbia before Waste Management had ever filed a
16 C of O application explicitly stating that it was for solid
17 waste.

18 Now at the time Waste Management filled out the
19 application, the regulations then existing did not require a
20 company to state explicitly that it was going to use its
21 facility for the processing of solid waste. Companies merely
22 had to state that their proposed use of the business was for
23 carting or hauling for processing.

24 Nevertheless, as Mr. Hood can see and hopefully
25 you will soon see, the application went beyond that. The
26 application made it clear what we were doing.

1 In 1998, new regulations were implemented that
2 applied specifically to solid waste handling facilities. As
3 Mr. Mishkin mentioned briefly in his earlier presentation,
4 these regulations had been proposed initially in May of 1996.
5 By their very terms, these new regulations were to be applied
6 prospectively. They were not to apply to our November 25,
7 1995 application. They were only to apply to applications
8 pending on the time they were promulgated in May of 1996 while
9 ours had been pending for months.

10 Now we will show today how Waste Management has
11 followed all the applicable rules in effect at the time of the
12 filing of our C of O application, including the very important
13 standards of external effects under Section 804 and 805 of the
14 zoning regulations. There are some you may hear from the
15 Government today that Waste Management says it does not have
16 to comply. We don't say that. We merely state what the rules
17 state, that that is an obligation, there's an obligation to
18 submit something in writing when one seeks a building permit,
19 but the requirement to meet the standards set in Sections 804
20 and 805 exist whether or not you submit something, but again
21 Waste Management went beyond that which is required because we
22 actually submitted something in writing even though not
23 required to do so to demonstrate we complied with those
24 external effects. And to date, no one has ever told us that
25 we do not.

26 We will also describe the improvements Waste

1 Management has made to the facility over the past several
2 years to minimize any adverse effects it might have on other
3 uses in the CM zone in which it is located as well as any
4 negative effects on the residential areas which are over 300
5 feet away from the site.

6 You should be aware that there are other
7 recycling and construction waste facilities that are closer to
8 the residential areas, but we are 300 feet away. In a few
9 moments, Mr. Adolph will point out to you some of the other
10 facilities that are closer to the residential area, but are
11 not the ones that we manage.

12 Finally, we're also going to explain and show
13 to you how Waste Management has made improvements, not just to
14 the site where we manage the property, but improvements in
15 trash clean up, pick up and improvements for the entire
16 community that surrounds this area. Waste Management is a
17 good neighbor, but more than that, what we would say to you is
18 that we provide a desperately needed service to the District
19 of Columbia.

20 Please keep this in mind as you listen to the
21 testimony and the arguments about how DCRA actively prevented
22 Waste Management from obtaining a lawful C of O to provide
23 this service. Waste Management has tried for almost four
24 years now to work with DCRA, but the rules keep changing in
25 the middle of the game. We have now come to you for help to
26 help bring some sense back to the situation. We ask that you

1 grant our appeal today, both in the interest of fairness, and
2 because we're entitled to it.

3 Thank you very much, and you will now hear from
4 Mr. Mishkin, who will present a brief legal argument and then
5 we will present our witness and that will complete our direct
6 case.

7 VICE CHAIR KING: Excuse me, Madam Chair, I
8 have a question.

9 MR. WILSON: Yes ma'am.

10 VICE CHAIR KING: Has the -- has Waste
11 Management's business at Queen's Chapel Road been interrupted
12 during all of this period?

13 MR. WILSON: Has it been interrupted?

14 VICE CHAIR KING: Yes, I mean is it not
15 continuing to operate?

16 MR. WILSON: Yes, it is continuing to operate.

17 VICE CHAIR KING: So there's been no
18 interruption in your business.

19 MR. WILSON: No, there's been no interruption
20 in our business.

21 VICE CHAIR KING: Okay, and your reading of the
22 new Board of Zoning -- Zoning Commission regulations governing
23 trash transfer stations are that they would not apply to you?

24 MR. WILSON: They would not apply to us, Ms.
25 King, not out of a special favor to us, but because by their
26 very terms they are to be prospective. They are to apply to

1 those applications that were filed on or after the
2 promulgation of those rules in May of 1996.

3 VICE CHAIR KING: Okay, I think that is the
4 case, if I may say so, and that's what I would like to hear
5 about from you and your witnesses and from the Corporation
6 Counsel. I think that's the nub of this case and I hope that
7 we can -- we can deal with extraneous matters in great brevity
8 and concentrate on this legal question as to whether the new
9 Board of Zoning Commission regulations apply to you or not.

10 MR. WILSON: Ms. King, we share that view.
11 That is how we intend to present this. There have been
12 statements in other papers to indicate that we have no desire
13 to comply with external effects. We believe that it's wrong,
14 we know that it's wrong and
15 --

16 VICE CHAIR KING: I'm sorry, you don't want to
17 comply with what?

18 MR. WILSON: No, no, no. There have been
19 statements to the effect that Waste Management believes that
20 the external effects requirements do not apply to it. That's
21 just not true. We believe they apply to us. We believe they
22 comply and we believe we have submitted information, but we
23 agree with you that the nub of this argument is really a legal
24 one as to the application of the regulations.

25 VICE CHAIR KING: If you comply, why are we
26 messing with this? Why aren't you here presenting your

1 special exception? If you have no problem with complying with
2 the new Zoning Commission regulations, why are we arguing
3 about it? Why aren't you just presenting your case for a
4 special exception and we'll consider it?

5 MR. WILSON: Because, respectfully, the special
6 exception requirement is a new one that is part of the new
7 regulations. It was not part of the old regulations. It is a
8 requirement that we, as a matter of law --

9 VICE CHAIR KING: But you just said you're
10 complying with that, with it.

11 MR. WILSON: Yes, we are. Anyway, but that's
12 going beyond that which we are required to do. And all we are
13 saying, respectfully, is we should meet the standard that is
14 applicable and apposite at the time we applied. We meet that

15 VICE CHAIR KING: All right, that's the
16 argument I want to hear. I don't want to mess with a lot of
17 other stuff because that's the case.

18 MR. WILSON: And we agree with you, Ms. King.

19 CHAIRPERSON REID: May I? Mr. Wilson, the
20 application for a certificate of occupancy -- and this is a
21 key document in this case, the one that I see does not have --
22 the date is blurred -- we don't have a year. Does your have
23 the year? Because this, I think, is really a --

24 MR. WILSON: Let me say this, we will get you
25 one that is a clear copy.

26 VICE CHAIR KING: Do you have a copy? Do you

1 have the original?

2 CHAIRPERSON REID: The crux of the case is this
3 date and unfortunately on our copy it's blurred and we need to
4 have a clear copy as to the date of this application for
5 certificate of occupancy.

6 MR. WILSON: Let me say this, the original is
7 in your record. The copy that I have and I don't think
8 there's a dispute here and --

9 CHAIRPERSON REID: What does your say again?

10 MR. WILSON: Mine says 11/21 and then it says 9
11 and then the last number does appear to be blurred out as a
12 poor photocopy.

13 CHAIRPERSON REID: Well where is the original?

14 MR. WILSON: As I understand it, the original
15 is in your records.

16 CHAIRPERSON REID: No, we wouldn't have the
17 original, would we? You would have the original and supply us
18 with copies. Be that as it may --

19 MR. WILSON: The original is with DCRA. I
20 stand correct.

21 CHAIRPERSON REID: What we need is to have very
22 specifically a clear copy of this application that shows us
23 the date.

24 MR. WILSON: I think that Ms. Ray actually has
25 one.

26 CHAIRPERSON REID: Your case is basically being

1 built upon this particular document and the date therein,
2 correct?

3 MR. WILSON: Yes ma'am. I think Ms. Ray either
4 has the document --

5 MS. RAY: Well, no. Madam Chair, the District
6 will stipulate to the date of the application was 11/21/95.
7 There's no dispute over the date. The dispute centers around
8 whether they were entitled to the C of O as a matter of right
9 under that application.

10 CHAIRPERSON REID: Okay, so you will stipulate
11 the date as of 11/21/95?

12 MS. RAY: Correct.

13 CHAIRPERSON REID: Thank you.

14 MS. RAY: And also at this time, Madam, the
15 District would like to be able to make an opening statement.

16 CHAIRPERSON REID: Not at this time.
17 Basically, the sequence of the proceedings is the statement of
18 witnesses of the Appellant, then the Zoning Administrator and
19 at that time -- and Government officials, and at that time you
20 can then make your statements.

21 MS. RAY: Okay.

22 CHAIRPERSON REID: But not during their
23 presentation.

24 COMMISSIONER HOOD: Madam Chair, I have a
25 question for Mr. Wilson.

26 CHAIRPERSON REID: Yes.

1 MR. WILSON: Yes sir.

2 COMMISSIONER HOOD: You have no break in

3 action, you're still operating, but my question is what are

4 you operating under now?

5 MR. WILSON: Well, we're operating under, I

6 believe there's a letter, is it from May 22, 1996 from -- I

7 refer to a judgment there -- actually, it's from BLRA and we

8 can show you that document which allows us to continue to

9 operate. Let me --

10 COMMISSIONER HOOD: Let me just ask is that

11 under your interim permit?

12 MR. WILSON: Yes.

13 COMMISSIONER HOOD: And when you were issued

14 that interim permit was there a deadline on the amount of time

15 you had to operate on that interim permit?

16 MR. WILSON: No, there was not, but what was

17 stated at that time was that we then needed to file another C

18 of O which application, which we in fact filed.

19 COMMISSIONER HOOD: Was the interim permit

20 issued on some other activities that's supposed to take place

21 later, for instance, the regulations -- I'm just trying to get

22 a feel for when you had the interim permit, was there was

23 something else that was supposed to fall into line afterwards?

24 MR. WILSON: No, no sir.

25 COMMISSIONER HOOD: Thank you.

26 MR. WILSON: Thank you very much.

1 MR. SOCKWELL: Mr. Wilson, one question. Is it
2 not true that at the time you filed for your certificate of
3 occupancy, there was no definition in the zoning ordinance of
4 the solid waste facility that you are asking to be
5 grandfathered to operate? It was considered an intermediate
6 materials whatever facility?

7 MR. WILSON: Well, that's not entirely true, I
8 mean the fact is at the time the regulation specifically had a
9 matter of right, as I mentioned earlier, for carting or
10 hauling to terminal or yard. And that's what the language
11 stated. Period. In order for that to mean something,
12 obviously, the regulations don't tell you what one can cart or
13 haul. They don't say is it beer or is it newspaper or is it
14 garbage or whatever, but obviously, as long as the -- we meet
15 that particular language and we do, we believe that we are
16 covered. Had there been a statement in there limiting the
17 carting and hauling to certain types of businesses and
18 excluding us, then I think there might be a different reading,
19 but there is no such reading.

20 MR. SOCKWELL: But you would agree that the
21 requirements of the solid waste handling facility more
22 appropriately fit the definition of an intermediate materials
23 recycling facility in the requirements for external effects
24 being dealt with and that sort of thing, that a hauling and
25 carting, as it's defined facility is generally considered by
26 the way it is expressed in the ordinance at that time to be

1 something other than a facility that would handle the types of
2 materials and the types of transfer of materials that would be
3 associated with a solid waste transfer facility, would you not
4 say?

5 MR. WILSON: I would disagree respectfully.
6 Our facility is not a recycling facility.

7 MR. SOCKWELL: I understand that. I'm not
8 saying that it is.

9 MR. WILSON: And I want to answer your question
10 forthrightly, Mr. Sockwell. As you know, carting and hauling
11 are terms that have been used historically for the past 100
12 years to describe the transport, the garbage business.
13 Indeed, as you have no doubt seen in our papers we talk about
14 how many of the companies that are not Waste Management
15 affiliated that deliver to our facility have the name hauling
16 or haul in their title. And so we believed that was the most
17 appropriate section, but mindful, Mr. Sockwell, that there had
18 been a history here, that no one that was operating these
19 businesses at the time in 1995, ever said in the light of day
20 with the lights on what they were doing explicitly in their C
21 of O in that particular paragraph that I noted in paragraph 9.
22 We stated explicitly what we were doing with that carting and
23 hauling.

24 MR. SOCKWELL: That's true.

25 MR. WILSON: There was never any attempt to
26 hide that and so what I would say to you respectfully, because

1 we were not a recycling facility, we felt that carting and
2 hauling was the best way to describe -- was the best one and
3 we thought a specific description was the forthright way to
4 approach and indeed, as Mr. Mishkin suggested "beg" is a
5 strong word, but we were certainly strongly urged and
6 encouraged by officials of the District Government to submit
7 this application and to be explicit about what it was that we
8 were doing there. And we were.

9 MR. SOCKWELL: And you were probably fairly
10 well aware that the Government's certificate of occupancy
11 branch would have had generally relatively little
12 understanding of exactly what those processes meant.

13 MR. WILSON: That's precisely why, I appreciate
14 your point, and that is precisely why we were explicit not
15 only in those lines 9 and 10, but what I would say to you
16 respectfully in our letter also dated the 21st, there's an
17 explanation of what's going on. But I think what's most
18 important is the language on lines 9 and 10 and I think we --
19 there was no disguise of what's going on. We were as explicit
20 and as clear as could be on the appropriate line, adding
21 amplification. And the other thing that I would hasten to add
22 is that I believe it's pretty clear what our name is on that
23 application. Our business is one where our title says what we
24 are. We manage waste. So were not like the ice cream company
25 trying to carry on a garbage business and hiding behind the
26 name Jerry's or Breyer's. We said we're Waste Management and

1 we want to have a solid waste handling facility, transfer
2 facility that disposes of trash at that facility for disposal
3 outside of the District. And I hope I've answered your
4 question.

5 MR. GILREATH: Mr. Wilson, how could there have
6 been any confusion on the part of the District, I agree, 9 and
7 10 it says specifically solid waste handling facility and
8 compacting, loading and compacting transfer for final
9 disposition outside the District of Columbia. I don't
10 understand how the District could have confused that. It's
11 straightforward and I think equivocation as far as I'm
12 concerned.

13 MR. WILSON: Mr. Gilreath, I would agree with
14 you.

15 MR. GILREATH: And they're saying subsequently
16 that they didn't really understand what you were intending to
17 use this facility for?

18 MR. WILSON: Well --

19 VICE CHAIR KING: I don't think, Mr. Gilreath,
20 that he should be answering that question. I think your
21 question most properly belongs to the Government.

22 MR. GILREATH: Okay, I'll withdraw the question
23 and I'll ask the District later then.

24 MR. WILSON: What I will say and then I'll sit
25 down, as I want to stick to our schedule, but Mr. Mishkin is
26 going to address some of those points and will tell you the

1 different things we were told at different times by the
2 District, but please know, whatever we were told at any time,
3 we were always clear about what we wanted to do and we have
4 always striven to follow the procedure as it was articulated
5 differently from time to time to time.

6 MR. MISHKIN: Thank you. I am Andrew Mishkin
7 representing Waste Management. If I may just follow up one
8 further point in response to Mr. Sockwell's question.
9 Included as Exhibit I to Waste Management's June 23rd
10 statement of the applicant is a copy of the case, Citizens of
11 Brentwood versus District of Columbia Board of Zoning
12 Adjustment. That's a 1993 case that was decided prior to the
13 1995 submittal of the certificate of occupancy application.
14 In that case, the District of Columbia Court of Appeals ruled
15 that an application for certificate of occupancy for a
16 processing facility, in that case it was a recycling facility
17 was permitted and essentially said because there is no
18 specific definition in the zoning regulations about what must
19 be processed that recycling activities were a permitted use in
20 that zone. So essentially the response to your question was
21 solid waste a solid waste handling facility, not a
22 specifically permitted use in a CM zone in 1995? The answer
23 is that under applicable court decisions it was clear that the
24 zoning regulations had general categories and that absent some
25 specific exclusion or prohibition that if an activity falls
26 under one of the general categories that are permitted as a

1 matter of right, then there need not be a specific listing of
2 that particular activity. And that is one of the bases for
3 the certificate of occupancy application. In fact, it was not
4 only as a carting or hauling facility or yard, but it also
5 stated that it was a processing establishment as Mr. Wilson
6 read to you, and specified that the processing was for solid
7 waste.

8 MR. SOCKWELL: The one thing about Section
9 802.3 of the zoning ordinance at that time is that it -- where
10 discussing intermediate waste or intermediate materials,
11 recycling facilities, it while not specifying that your use
12 would be that use, it does speak directly to some of the
13 activities that would take place in a more specific facility
14 than that generally called a handling, whatever --

15 VICE CHAIR KING: Hauling.

16 MR. SOCKWELL: Carting, express moving or
17 hauling terminal or yard. There is a more direct relationship
18 between specific activities that would fall in the description
19 that you placed on the application, but certainly outside of
20 the description of the carting and hauling facility.

21 MR. MISHKIN: If I may, Mr. Sockwell, it's my
22 understanding that the 802.3 special exception procedure was
23 adopted subsequent to the Brentwood case and Waste Management
24 was aware of that section of the zoning regulations and
25 believed that it was inapplicable because this facility was
26 not a -- purely a materials recycling facility, and in fact,

1 at no time did DCRA take the position that 802.3 was
2 applicable. Either they did not ever suggest or request that
3 Waste Management seek a special exception under those
4 provisions.

5 And we believed that under the Brentwood case
6 and under the common definitions of carting and hauling,
7 terminal or yard, that those were the most appropriate
8 categories.

9 I'd also -- I have a prepared presentation
10 which is brief, but I would like to digress from that for a
11 moment to get right to a concern raised by Ms. King about the
12 question of what regulations were applicable to Waste
13 Management. That is an issue that we believe is clearly
14 addressed in 11, Title 11 DCMR in the zoning regs. Section
15 3203.7 and 3203.8 and those sections make clear that even if
16 an application for a certificate of occupancy is filed, when
17 the Zoning Commission has pending a proceeding to consider an
18 amendment of the zoned district classification of the site of
19 the proposed use, if the application is filed on or before the
20 date on which the Zoning Commission makes a decision to hold a
21 hearing on the amendment, any use which is authorized by a
22 certificate of occupancy may be established and continued
23 pursuant to the terms of the certificate and the provisions of
24 this title, in effect, on the date the certificate is issued,
25 subject to the following conditions and there are numerous
26 ones, the primary one being the use shall be designated on the

1 certificate of occupancy in terms of the use classification
2 which is established by this title. So we believe that that
3 is a very clear provision and it is a general fundamental
4 principle of zoning law that an existing use under current
5 regulations or an applied for use under current regulations is
6 permitted. I should point out that the zoning text amendment
7 proceeding that not yet begun. You will note that the case
8 was No. 96-5 that promulgated these special exception
9 regulations for solid waste handling facilities and the Waste
10 Management application was in November of 1995. So that it's
11 not a matter of whether the case had been set down for a
12 hearing, the rules had not even begun to be proposed yet.

13 Now the fundamental in this case are as Mr.
14 Wilson said, quite simple. In November of 1995, Waste
15 Management applied for a certificate of occupancy for a
16 carting or a hauling terminal or a yard or a processing
17 facility specifying that it was a solid waste handling
18 facility for receipt, loading, compacting and transfer of
19 solid waste and/or construction and demolition, debris, all
20 materials nonhazardous. That is a use that Waste Management
21 contends and we believe it is clear was -- to which it was
22 clearly entitled as a matter of right under the then current
23 zoning regulations. That application for a certificate of
24 occupancy was wrongfully denied by the Building and Lands
25 Regulation Administration and the BZA, we respectfully
26 request, should correct that error and order the BLRA to issue

1 that certificate of occupancy.

2 By doing so, I should point out that the Board
3 will avoid the legal thickets presented by the Brentwood case,
4 by the Taylor case. It will avoid the need to set precedence
5 for what qualifies for a special exception and doesn't qualify
6 for a special exception under the new zoning text amendments.
7 And in addition, will leave the zoning text amendments free
8 from potential challenge that might exist if Waste Management
9 were required to seek a special exception under them.

10 Equally important, a decision to grant the
11 certificate of occupancy would allow a transfer station to
12 operate that essentially does comply with the substance of the
13 1998 text amendments and Waste Management's real issue here is
14 whether or not it should be required to seek a special
15 exception which is a discretionary decision on the part of the
16 Board when it was entitled, as a matter of right, and is
17 entitled as a matter of right, to the certificate of
18 occupancy.

19 Now Mr. Wilson gave the background and some
20 history and I understand that you would like us to expedite
21 matters here, so I will only briefly point out that until the
22 mid-1990s, the District of Columbia Department of Public Works
23 handled all solid waste generated in the District of Columbia,
24 both residential and commercial. And by the way, for
25 commercial, we mean multi-family residences, apartments, which
26 constitute the vast majority of residences in the District of

1 Columbia. It was only in 1994 as a result of the Supreme
2 Court decision that restricted the District's ability to force
3 all solid waste to come to its transfer stations and charge
4 above market prices, that the District essentially decided to
5 exit from the business of handling commercial waste at its
6 transfer stations.

7 However, the absence of the District from that
8 business did not mean that the need went away and it was
9 filled by private operators of transfer facilities because
10 there are no landfills in the District of Columbia. Waste is
11 collected in smaller, short haul vehicles and as Mr. Adolph
12 will explain, environmental and economic considerations
13 require transfer stations.

14 Now the original Perkins certificate of
15 occupancy for this property which is the subject of the other
16 appeal that we are discussing together with one, was one of
17 the existing certificates of occupancy and that was one of the
18 existing facilities that was
19 -- which Waste Management took over the management of.

20 VICE CHAIR KING: Excuse me, you've lost me,
21 Mr. Mishkin. What is the Perkins certificate of occupancy?
22 Do we -- is that before us?

23 MR. MISHKIN: That is the certificate of
24 occupancy for which Waste Management sought the name change in
25 -- it's the second appeal that is before you which is case
26 number 16452.

1 VICE CHAIR KING: Okay.

2 MR. MISHKIN: Now, in the mid-1990s, the
3 District of Columbia Council enacted a series of statutes to
4 regulate private solid waste handling facilities. It imposed
5 an extensive regulatory and permitting regime so that Waste
6 Management was already operating the transfer facility, was
7 managing the transfer facility and became subject to this new
8 regulatory regime which incidentally was challenged in Court
9 by the operators of some of the transfer facilities.

10 In response to DCRA's request, Waste Management
11 did file in 1995 the certificate of occupancy application that
12 is the subject of this appeal and that's important to note.
13 That was filed in conjunction with, in consultation with DCRA
14 and as explained previously, explicitly and clearly stated
15 that the use of the facility was as a solid waste management
16 facility. The application also fully addressed external
17 effects.

18 Now, on February 21, 1996, the Building and
19 Land Regulation Administration denied that application and
20 order Waste Management to seek a variance from the BZA. You
21 should note that BLRA said variance. Did not say seek a
22 special exception, because the zoning text amendments were not
23 yet even pending at that point.

24 The denial was clearly contrary to the general
25 intent and the specific provisions of the zoning regulations.
26 The denial said that a solid waste handling facility was not

1 permitted in a CM zone and purported to rely on 11 DCMR
2 Section 800.6 and that section states no use specifically
3 prohibited in an M district shall be permitted in a CM
4 district. The denial went on to site certain prohibited uses
5 in M districts, including slaughterhouses, animal rendering
6 facilities, oil refineries, bone products manufacturing,
7 curing, tanning or storage of hides, fertilizer, manufacturing
8 and "other uses with objectionable characteristics similar to
9 those listed."

10 Now, this is crucial because 11 DCMR says that
11 you cannot do in a CM zone what is specifically prohibited in
12 an M zone and I just read for you from the list of what is
13 specifically prohibited in an M zone. At the end of that list
14 is a nonspecific catch all provision that says facilities like
15 that are not allowed in an M zone. But the BLRA stated in
16 February 1996 that there was a legitimate question as to
17 whether carting, hauling and processing of solid waste has
18 similarly objectionable characteristics and as such should be
19 banned from CM district.

20 Now this position, this argument totally and
21 completely ignores the use of the word specifically in section
22 800.6 and instead, it attempts to rely on that catch all
23 provision.

24 Now BLRA's interpretation of Section 800.6 in
25 the zoning regulations would essentially render the word
26 "specifically" a nullity and that would violate a basic

1 principle of statutory and regulatory construction which is
2 that every word in a statute or a regulation is to be accorded
3 significance. It is not up to those who interpret statutes
4 and regulations to say we don't need to pay attention to that
5 word, it doesn't mean anything that it's in there.

6 Now it's clear from the list of specifically
7 prohibited uses in M districts that the Zoning Commission had
8 the capability to identify and describe prohibited uses and
9 there's another statutory maxim: to express one is to exclude
10 the alternative which means that the listing of specific
11 prohibitions means that items that are not specifically listed
12 are not specifically prohibited. And there's even a District
13 of Columbia Court case on that subject. The District of
14 Columbia Department of Corrections versus Teamsters Union
15 Local 246 and that case is reported in 1989 at 554 A.2d 319.

16 Now the absurdity of BLRA's position is even
17 more clear when you consider that another use permitted as a
18 matter of right in a CM district is an incinerator. Now
19 that's in Section 801.7d. Incinerators are very often used to
20 incinerate solid waste and it's also was noting that the
21 regulations do not limit what may be incinerated. So clearly
22 if incinerators are allowed such as the old incinerator at
23 Benning Road, then solid waste transfer facilities would not
24 be included in the list of specifically prohibited uses.

25 Now the activities conducted at the Queens
26 Chapel Road facility clearly also constitute processing, as

1 I've discussed before, under the definition in the regulations
2 and as clarified in the Brentwood and in the Taylor cases.

3 In addition, in the Taylor case which is a
4 March 1998 decision, it is stated that when a specific use is
5 not defined in the zoning regulations, the procedure that was
6 used to account for the lack of definitions in the regulations
7 was to give a certificate of occupancy with a description of a
8 use that would give the average person an understanding of the
9 nature of the business.

10 Now Members of the Board, I would submit that
11 the certificate of occupancy submitted by Waste Management
12 would give the average person an understanding of the nature
13 of the business. We couldn't have been more explicit than we
14 were.

15 Now it's important to note that what Waste
16 Management was seeking in its certificate of occupancy is not
17 something wildly different from what's permitted in CM
18 districts. I'm quoting from Section 800.3 and 800.2 here
19 which says that CM districts are "intended to provide sites
20 for heavy commercial and light manufacturing activities
21 employing large numbers of people and requiring some heavy
22 machinery under controls that would minimize any adverse
23 effects on other nearby more restrictive districts. Heavy
24 truck traffic and loading and unloading operations shall be
25 expected to be characteristic of CM districts." That's right
26 there in the regulations.

1 Now clearly the certificate of occupancy
2 proposed activities met the definition of carting or hauling,
3 excuse me, terminal or yard. The zoning regs don't limit or
4 define what can be carted or hauled and as Mr. Wilson has
5 indicated, both of those terms have historically been
6 associated with solid waste in both the Government and private
7 sectors. You can even see the use of those terms in a case at
8 66 F.2d 1272, USA Recycling versus Town of Babylon, and all
9 you need to do is refer to the D.C. Yellow Pages under rubbish
10 and garbage removal to see all those companies that call
11 themselves hauling companies.

12 So it's clear that that application should not
13 have been denied and there's also no doubt that the zoning
14 regulations require that the C of O application should have
15 been processed in effect at the time of the application. I've
16 already discussed the sections of the zoning regulations which
17 make it clear that the 1995 rules are the ones that should be
18 applied to Waste Management's certificate of occupancy.

19 Now as you know in March of 1998, the Zoning
20 Commission adopted text amendments for solid waste handling --
21 I'm sorry, thank you, Mr. Wilson. These are examples of
22 Yellow Pages categories.

23 Under Rubbish and Garbage Removal, You Call, We
24 Haul; Hughes Trash and Hauling Service; Stevenson Brothers
25 Trash and Hauling; Alliance Junk Hauling" -- we would note
26 that carting or hauling terminal or yard obviously means a

1 point to which trucks that are hauling and carting go and
2 discharge their contents and then depart from the yard as
3 well.

4 As I mentioned, in March 1998, the Zoning
5 Commission adopted text amendments for solid waste handling
6 facilities that require such facilities to obtain a special
7 exception and imposed other requirements. Those regulations
8 cannot legally be applied to Waste Management's 1995 C of O
9 application --

10 MS. PRUITT-WILLIAMS: Excuse me, Mr. Mishkin, I
11 hate to cut you off. I just wanted for a procedural issue,
12 those exhibits aren't currently in the record, is that
13 correct?

14 MR. WILSON: Yes, that is correct.

15 MS. PRUITT-WILLIAMS: I would suggest you ask
16 the Board if they would allow them in the record.

17 MR. WILSON: We certainly will. We were going
18 to wait until the end but we'll do it now, thank you.

19 MS. PRUITT-WILLIAMS: So that all exhibits that
20 come up would be allowed.

21 MR. MISHKIN: I respectfully request that this
22 be submitted for the record.

23 MS. PRUITT-WILLIAMS: Thank you.

24 MR. MISHKIN: I'd like to try to wrap up here.

25 As Mr. Wilson and Mr. Adolph will demonstrate, the Queens
26 Chapel facility essentially complies with the virtually all of

1 the substantive requirements of the 1998 text amendments. The
2 BZA rules against this appeal, then the District will almost
3 certainly face litigation because Waste Management will be
4 left with no choice but to pursue litigation and/or a
5 politically charged special exception proceeding which will
6 also likely result in further litigation.

7 If the BZA rules favorably on this appeal, the
8 only significant effect would be that Waste Management would
9 be able to continue to manage the facility at Queens Chapel
10 Road without being required to obtain a special exception.
11 The ruling would not have any effect on the District's zoning
12 regulatory scheme for solid waste facilities or for other
13 requests for special exception for solid waste facilities
14 under the revised zoning regulations that were filed after the
15 regulations were set down for hearing.

16 Even more important, I have been authorized by
17 counsel for Perkins to indicate that a granting of this appeal
18 would result in the withdrawal of the Perkins appeal to the
19 D.C. Court of Appeals of the revocation of the Perkins
20 certificate of occupancy for this property. And that case
21 could well reaffirm the Brentwood and Taylor decisions that
22 materials processed at a processing facility need not be
23 specified.

24 Now I've already briefly addressed the Perkins
25 certificate of occupancy. That certificate of occupancy was
26 in effect at the time Waste Management filed its November 1995

1 certificate of occupancy application and we included a
2 separate application to change the name of the Perkins
3 certificate of occupancy which was for a processing facility,
4 not specifying solid waste, to change that to the name of
5 Waste Management. In the interim, between the filing of the
6 application and the issuance of the decision by BLRA, the
7 Board of Zoning Adjustment revoked that certificate of
8 occupancy. We believe that that revocation was incorrect and
9 Perkins has appealed that revocation to the District of
10 Columbia Court of Appeals. That appeal is still pending. We
11 believe it would be appropriate for the Board to direct BLRA
12 to issue that name change certificate of occupancy. However,
13 if the Board does not agree, does not wish to direct the BLRA
14 to issue that name change certificate of occupancy, then we
15 would respectfully request that the Board direct BLRA to hold
16 its decision on that issue in abeyance until the Court of
17 Appeals rules on the appeal of the revocation of the Perkins
18 certificate of occupancy.

19 I just want to very briefly mention the legal
20 issue of the standard of external effects. Although sections
21 801.7(a) and (j) state that uses permitted as a matter of
22 right are subject to the standards of external effects set
23 forth in Section 804, as far as issuance of a certificate of
24 occupancy, the regulations in BZA's practice make clear that
25 this requirement only applies to building permits and although
26 801.7 refers to external effects standards, all 804 does is

1 list the standards. The operative provisions regarding when
2 and how external effects are addressed is in Section 805 which
3 states that when filing an application for a permit for a use
4 permitted under 801.7, the applicant shall submit with the
5 application three copies of certain information.

6 Now Waste Management reserved its rights with
7 respect to submittal of information regarding external
8 effects, but did submit that information to
9 -- with its certificate of occupancy application. And as will
10 be shown by Messrs. Wilson and Adolf, has continued, to comply
11 with those requirements.

12 In closing, it's important to note that the
13 Queens Chapel facility is one of the very few solid waste
14 handling facilities that has not been taken to Court by the
15 District of Columbia Government nor has it resulted in a
16 lawsuit in Court against the District of Columbia Government
17 by Waste Management.

18 There's a long history here of good faith and
19 willingness not just to comply with the regulatory programs,
20 but also to cooperate with DCRA's efforts to bring solid waste
21 facilities into its regulatory system rather than to fight the
22 system as others have.

23 Now that's especially true with respect to
24 zoning issues. But the response from DCRA has not been
25 reciprocal. From the beginning, Waste Management has played
26 by the rules despite the numerous rules changes in the middle

1 of the game imposed by DCRA. Now we respectfully ask that
2 this Board make DCRA and BLRA play by the rules and require
3 them to issue the certificate of occupancy that Waste
4 Management applied for in 1995.

5 Thank you.

6 CHAIRPERSON REID: Mr. Mishkin, let me ask you
7 a couple of questions. One, when you referred to these ads,
8 tell me what is it, how do these ads fit into your
9 presentation? These ads were --

10 MR. MISHKIN: Waste Management's 1995
11 application for a certificate of occupancy had two uses
12 listed. One was for a carting or hauling, terminal or yard.
13 And we believe that under common understanding, common
14 dictionary and usage, historical usage, as demonstrated by
15 what appears in the Yellow Pages, that the average person
16 would understand that hauling is a term that could and would
17 be applied to solid waste.

18 Now that did not prevent Waste Management from
19 including in its application that it was specifically for a
20 solid waste handling facility, but we believe that because
21 these terms are so obviously associated with solid waste that
22 that means the category in the zoning regulations which makes
23 carting and hauling terminals and yards a use permitted, as a
24 matter of right, in a CM zone, subject to the standard of
25 external effects, meant that that is an appropriate category
26 for BLRA to have granted the certificate of occupancy.

1 CHAIRPERSON REID: And what was the category in
2 the Yellow Pages that these ads came from?

3 MR. MISHKIN: Rubbish and garbage removal. So
4 these are trucks that haul and what the trucks do is they haul
5 solid waste from a residence or from a commercial business to
6 a terminal or yard, a solid waste handling facility and then
7 they haul the solid waste from that terminal or yard to its
8 final disposal facility.

9 CHAIRPERSON REID: Was Waste Management listed
10 in the Yellow Pages under this category?

11 MR. MISHKIN: I believe Waste Management was
12 listed, although Waste Management would have been listed under
13 the name Waste Management. That was the company's name so it
14 was -- it did not have haul in its name at the time and it
15 does not now.

16 CHAIRPERSON REID: No, no, my point is, you
17 don't know if it was listed in the Yellow Pages under this
18 category, categorized with these other quote unquote similar
19 types of companies.

20 MR. MISHKIN: I cannot tell you that I know but
21 I would I would be amazed if it were not. I believe it was.
22 We can find that out and submit supplementally for you.

23 CHAIRPERSON REID: I would think you would have
24 had that reflected in your exhibit.

25 MR. MISHKIN: Actually, we only highlighted for
26 the Board here the companies that use the term "haul" in their

1 name or in their ad.

2 CHAIRPERSON REID: Right, but by inference, if
3 I'm understanding you correctly, you're saying that the
4 similarity is blatant between Waste Management and these
5 companies, notwithstanding the fact that they did not say
6 "haul," nonetheless, they are all similar in their content.

7 MR. MISHKIN: Yes, Ms. Reid.

8 CHAIRPERSON REID: If I understand it correctly
9 --

10 MR. MISHKIN: Yes, right.

11 CHAIRPERSON REID: The point that you're
12 making.

13 MR. MISHKIN: And as I said, if you wish I can
14 -- we can submit supplementally for you if Waste Management
15 appears, as I believe it does, under the category Rubbish and
16 Garbage Removal, which I believe it does, we'll submit the
17 Yellow Pages listing for it.

18 So it would be in the same category as these
19 other companies, yes.

20 CHAIRPERSON REID: Okay. Now my other question
21 was you had requested in your presentation that the BZA
22 required that the BLA do what? Repeat that again.

23 MR. MISHKIN: That the BLRA issue the
24 certificate of occupancy applied for by Waste Management.

25 CHAIRPERSON REID: I don't know that we have
26 the authority to do that.

1 MR. MISHKIN: We are appealing an adverse
2 decision from BLRA. BLRA denied the application for a
3 certificate of occupancy and as we understand it, this Board
4 has the authority to correct the error of BLRA and order BLRA
5 to issue this certificate of occupancy.

6 CHAIRPERSON REID: No, no, no. There was
7 something else that you referred to earlier.

8 MR. MISHKIN: With respect to the name change?

9 CHAIRPERSON REID: Maybe so.

10 MR. MISHKIN: With respect to the name change
11 what we are asking for are two alternative forms of relief.
12 We are asking either that the Board order the BLRA to issue
13 that certificate of occupancy, as applied for, or if the Board
14 believes that it's inappropriate to do so because the appeal
15 case is currently pending before the District of Columbia
16 Court of Appeals that you order the BLRA to hold the decision
17 on that matter in abeyance until a final ruling by the
18 District of Columbia Court of Appeals, because if the Court of
19 Appeals rules that the revocation was improper, then the
20 Perkins certificate of occupancy would essentially be back in
21 effect, and therefore we would have been entitled to the name
22 change. So it was not appropriate for BLRA to deny it
23 outright. We believe that the worse they should have done
24 would be to say we will hold our decision in abeyance until
25 that appeal is resolved.

26 CHAIRPERSON REID: I see. Okay. I think I got

1 a little confused.

2 MR. MISHKIN: I'm sorry if I confused you. I
3 was trying to compress that argument in as little time as
4 possible.

5 CHAIRPERSON REID: Direct the BLRA and I thank
6 you for clarifying it for me.

7 MR. SOCKWELL: Mr. Mishkin, in the description
8 of your requirement or lack thereof to comply with standards
9 of external effects, you very specifically spoke to the fact
10 that Section 805 pertains only to applications for building
11 permits. I find that incomprehensible.

12 MR. MISHKIN: We --

13 MR. SOCKWELL: The issue is that a certificate
14 of occupancy in the District of Columbia is called just that.
15 In other jurisdictions, the same is called use and occupancy
16 permit and other terms. For lack of a definition of permit
17 that limits it to only building permit, there is nothing in
18 Section 805 that prevents a use as specified in Section 801.7
19 from being specifically and categorically required to respond
20 to external effects. In fact, in your statements, in your
21 presentation, page 17, you mention and I speak only to the top
22 two lines, "the provisions of the building permit or the
23 subsequently issued certificate of occupancy pursuant to
24 Section 805.3." Building permit is not the issue and
25 subsequently may fit your case, but it isn't in the regulation
26 as such. In fact, Section 805.3 does say the approved site

1 plan shall become a part of the provisions of the building
2 permit or certificate of occupancy. Or certificate of
3 occupancy does not say subsequent to the issuance of the
4 building permit or having to do with the construction
5 following a building permit having been issued. So in other
6 words, a certificate of occupancy in this case could be your
7 permit to occupy a previously existing facility for the
8 purpose intended. That purpose would be for a hauling
9 facility. It could be for whatever, but since your hauling
10 facility is actually in section 801.7, it would come under the
11 requirements for external effects and once you submit your
12 external effects letter, the District of Columbia could
13 require you to go further, based upon the requirements that it
14 sees fit to prove that provision of external effects mediating
15 facilities and/or operations have been put in place.

16 MR. MISHKIN: We agree that the use that Waste
17 Management sought is subject, it is a matter of right use that
18 is subject to the standard of external effects. The only
19 question in our view was whether that information was required
20 to be submitted with the certificate of occupancy. I
21 understand that you can characterize the certificate of
22 occupancy application or certificate of occupancy as a permit.
23 We understand that the practice in the past of BLRA was not to
24 require the information with regard to external effects for a
25 certificate of occupancy application, but only to require it
26 when there was new construction involved.

1 However --

2 MR. SOCKWELL: That would be an implementation
3 issue on their part, but would not speak to the validity of
4 the law.

5 MR. MISHKIN: Okay, and in any case, we do
6 agree that the actual substantive requirements of external
7 effects are applicable and Waste Management out of an
8 abundance of caution did submit information with its
9 certificate of occupancy application in 1995.

10 MR. SOCKWELL: But you have stated in your
11 documentation that Section 805 only pertains to applications
12 for building permits which is incorrect.

13 CHAIRPERSON REID: Any other questions, Board
14 Members?

15 COMMISSIONER HOOD: Not at this time.

16 CHAIRPERSON REID: Okay. Thank you.

17 MR. MISHKIN: Thank you.

18 MR. WILSON: If I might just take a moment, Mr.
19 Sockwell, if I could just address very briefly the point you
20 were making. I appreciate your reading of those provisions
21 and quite frankly don't dispute them at this point. I think
22 what's most important is we agree that we must meet the
23 standard (a), and (b) we did, in fact, make a written
24 submission at the time our application was submitted and I
25 respectfully agree with your point, but from our standpoint we
26 do not wish to make the focus for Waste Management's viewpoint

1 of this -- of how we interpret that specific regulation. We
2 think compliance ultimately with it and as you have
3 interpreted it, we, in fact, do meet that standard and so I
4 just want to say I appreciate your education of us on the
5 matter.

6 MR. SOCKWELL: I have one other question which
7 is merely one of documentation. The certificate of occupancy
8 application copy which is shown within the files that we've
9 received is one that was prepared, but not submitted. This is
10 not a submitted copy. This is merely a prepared file copy
11 from your own records. Is there a copy available that shows
12 that this was actually submitted to the District of Columbia
13 and went through at least the intake process?
14 It would have signatures on it.

15 MR. MISHKIN: We have a copy of a letter that
16 was the transmittal letter. We have a copy of the letter that
17 was the transmittal letter submitted on November 21, 1995 that
18 is -- receipt is acknowledged by the certificate of occupancy
19 counter. But I believe that the signed copy of the -- the
20 bottom part that's filled out by the information desk is in
21 the possession of DCRA.

22 MR. SOCKWELL: Generally, the certificate of
23 occupancy counter doesn't give you transmittals back when you
24 submit certificate of occupancy applications. They do give
25 you receipts for payment.

26 MR. MISHKIN: Yes.

1 MR. SOCKWELL: And they do indicate specific
2 items such as the zone and other things on the application. I
3 would have preferred to see a document that had been
4 registered with the District rather than one that came
5 strictly out of your prefiling records.

6 MR. WILSON: If I might respond --

7 MR. SOCKWELL: It would be much more
8 appropriate.

9 MR. WILSON: We hear you, Mr. Sockwell, and if
10 the Board will give us permission to keep the record open,
11 what we'd like to do is go to DCRA and get the copy that
12 reflects the signatures.

13 What I would like to state is this particular
14 transmittal copy that Mr. Mishkin has described, does show a
15 date, does show the date clearly as 11/21/95. The earlier
16 copies we submitted to you as I indicated and as you know, you
17 know that of course, did not. So we're almost there and we
18 intend to get there, so with the Board's permission we would
19 like to seek to go to the DCRA to obtain a copy of the signed
20 version.

21 We appreciate your desire to have this record
22 as clear and as accurate as possible.

23 CHAIRPERSON REID: Thank you.

24 MR. WILSON: What we'd like to do now with the
25 Board's permission is Mr. Adolph is going to make a
26 presentation and what he will do, of course, as I mentioned

1 earlier, describe our process there and describe what our
2 business is. I think it will be helpful. We think it could
3 be done -- I've asked him to shorten the presentation from
4 what we had planned previously. In order to expedite the
5 matter, I'll do something very unlawyer-like. What I'd like
6 to do is allow him to make that presentation quickly with as
7 few questions as possible from me so that I don't slow that
8 presentation down and maybe if there are a few questions to
9 clear it up at the end of his presentation I will do so.

10 Obviously, any time the Board wishes to
11 interrupt and ask him questions, please do so.

12 CHAIRPERSON REID: Okay.

13 MS. RAY: The District has one objection to Mr.
14 Adolph's -- I'm sorry, Anita Ray on behalf of the Government,
15 has one objection to Mr. Adolph's presentation and that it
16 goes to relevance. This issue as Ms. King has so aptly put is
17 about whether the date, what regulations should Waste
18 Management be subject to and it goes to whether they were
19 entitled to a C of O as a matter of right when they issued the
20 application. It doesn't go to how the facility is run. This
21 is a trash transfer station. We know what it is. None of
22 that is relevant to the legal issue of whether they're
23 entitled as a matter of right or whether their operation fits
24 within carting or hauling or as Waste Management would put,
25 that these are traditionally accepted terms that people should
26 know is a trash transfer station. And unless Mr. Adolph can

1 speak to that, telling us how the facility is operated really
2 has no relevance to the issue here of whether they are subject
3 of the old regulations, the new regulations or whether they
4 were entitled to a C of O as a matter of right based on their
5 application filed 11/21/95.

6 We already know the standard of external
7 effects does apply to them which we submit requires you to
8 look at more than just words on an application, so we don't
9 believe that Mr. Adolph can speak to that issue and therefore
10 object to any presentation that he would make.

11 MR. WILSON: Ms. Reid Cross, may I address that
12 briefly?

13 CHAIRPERSON REID: Yes.

14 MR. WILSON: We've waited almost four years and
15 we appreciate this Board's indulgence of us.

16 CHAIRPERSON REID: What I was about to say was
17 that I think that in your introduction for Mr. Adolph you
18 stipulated that in the interest of time that he would
19 basically give us the salient points and those issues that
20 pertains specifically to this case without digressing into a
21 lot of extraneous information that we probably already have in
22 the written submission, so I would overrule that objection.

23 MR. WILSON: Thank you. We promise to move it
24 along.

25 VICE CHAIR KING: Madam Chair, is Mr. Adolph
26 going to speak to the legal issue which is really all that's

1 before us?

2 CHAIRPERSON REID: That's my understanding.

3 VICE CHAIR KING: So he's going to speak to the
4 legal issue, not a description of the facility and how it
5 operates, but he's going to deal with the legal issue?

6 CHAIRPERSON REID: I would not think that his
7 presentation was going to be specifically -- I was not going
8 to contain him that rigidly. I felt that in regard to the
9 external effects, and given the fact that we have a tremendous
10 amount of material in our files in opposition, that he was
11 going to speak to that aspect in the operations.

12 MS. RAY: Madam Chair --

13 MR. BASTIDA: Excuse me, Madam Chair --

14 CHAIRPERSON REID: Wait, wait, just one second.
15 One at a time.

16 MS. RAY: Madam Chair, I think that the
17 objection raised by the Government has -- is a valid one that
18 doesn't get us where we need to go in terms of the issues at
19 hand.

20 CHAIRPERSON REID: Thank you. Mr. Bastida?

21 MR. BASTIDA: I was just trying to call your
22 attention that your legal counsel wanted to advise you.

23 MR. WILSON: May I make one suggestion as a
24 compromise?

25 CHAIRPERSON REID: Okay.

26 MR. WILSON: What I was going to suggest, we

1 hear you very clearly. We also understand that there are
2 obviously members of the community who may wish to speak pro
3 or con. We thought that learning something about where it's
4 located, how it's operated might be helpful for the Board in
5 making its decision.

6 What we can do if the Board would prefer,
7 following up on questions related to external effects which
8 are clearly relevant, we thought it might be helpful if Mr.
9 Adolph could make a presentation that addressed those points.
10 Clearly, a legitimate concern in granting and determining
11 whether or not we're entitled to an application as Mr.
12 Sockwell, I though, very eloquently put it is whether or not
13 we're meeting those effects. And so I think a brief
14 presentation on this would be appropriate.

15 CHAIRPERSON REID: Okay, I think all things
16 considered --

17 VICE CHAIR KING: Excuse me, Madam Chair, could
18 I speak to that point before you make a ruling?

19 CHAIRPERSON REID: Sure.

20 VICE CHAIR KING: It seems to me that what Mr.
21 Wilson is asking is to argue the case for a special exception
22 without admitting that he needs to argue the case for a
23 special exception. What we're here to do is to determine
24 whether or not the BLRA properly or improperly did one thing
25 or another and the Perkins this and I mean how they are
26 operating and whether they comply with current or previous

1 standards is not at issue here. It's a legal question of
2 whether DCRA acted properly in handling their applications.

3 CHAIRPERSON REID: Okay.

4 VICE CHAIR KING: And how they operate, whether
5 they meet the standards that existed in 1995 or that have been
6 promulgated for a special exception and so forth is not the
7 case before us. That -- if we deny their application or their
8 whatever we've asked for --

9 CHAIRPERSON REID: Your point is well taken.

10 VICE CHAIR KING: -- Their appeal is --

11 CHAIRPERSON REID: Your point is well taken,
12 Ms. King.

13 VICE CHAIR KING: -- Then we hear all of that,
14 but not now.

15 CHAIRPERSON REID: And also, counsel, as well
16 as Mr. Bastida's position I think that given that I will
17 change my ruling on the objection and sustain it.

18 What we will do is allow Mr. Adolph to speak
19 and allow the Board Members to elicit from him any information
20 we feel that we need in regard to your operations or any of
21 the other aspects that we feel his presentation may be lacking
22 in as well as we will vigilantly listen to his presentation
23 and we will -- we can interrupt him if we feel that he's going
24 into areas that are not necessary at this time.

25 MR. WILSON: Quite frankly, Madam Chair, having
26 heard the comments of the Board, I think what we might do at

1 this point is to not call Mr. Adolph at this point and if
2 issues are raised by any Board Member about our operations, if
3 any Board Member has a question about external effects, we're
4 prepared to answer. One concern that we had so you understand
5 why the external effects was important to us is (1) we wanted
6 to make clear that we agree that external effects apply, and
7 (b) that we comply.

8 CHAIRPERSON REID: Okay.

9 MR. WILSON: Third, there's a possibility that
10 you could say we were entitled to our C of O, but arguably
11 remand to see whether or not we meet with external effects.
12 And our point is at the time we applied for C of O, we
13 submitted that information and it's been over there for four
14 years. And so, in our view, a decision either has been made
15 or should have been made on whether or not we meet those
16 standards.

17 CHAIRPERSON REID: All right.

18 MR. WILSON: But hearing that, we will hold
19 presentation of Mr. Adolph in abeyance --

20 MR. GILREATH: Madam Chair, it seems to me that
21 if we do not permit Mr. Adolph to speak, if we have other
22 witnesses and their argument is to say that they think the
23 appeal should be dismissed or something and their argument is
24 they're not meeting the external effects requirements, so we
25 say they shouldn't talk either because it's not relevant?

26 CHAIRPERSON REID: What we said, Mr. Gilreath,

1 was we did not deny Mr. Adolph the right to speak. What we
2 said was that we would allow him to speak, however, that he
3 would keep his remarks germane to the legal question that's
4 before us today and Mr. Wilson then withdrew Mr. Adolph as a
5 witness.

6 MR. GILREATH: Okay, so it's their choice.

7 CHAIRPERSON REID: Their choice.

8 MR. WILSON: Let me say this, I do appreciate
9 Mr. Gilreath's point. My wife would tell me what's good for
10 the goose is good for the gander and so we are prepared,
11 obviously, not to go into these types of facts, but on the
12 understanding that that same rule is going to apply to the
13 Government's presentation and to the comments from those in
14 the community. They're going to talk about the law and not
15 about the impact on the community. If that's the way it is,
16 so be it.

17 COMMISSIONER HOOD: I believe that we need to
18 be even across the Board, Madam Chair. While I do have some
19 questions that pertain to that, I don't know if this is the
20 correct time and I do have to concur with Ms. King right now,
21 if we could speak to the law. But on the other hand, I
22 personally have some questions that would deal with Mr. Adolph
23 testifying, but I don't know if this is the appropriate time.

24 CHAIRPERSON REID: Well, we do have a segment
25 when there's rebuttal by the Appellant and after we've heard
26 the entire case, if you note your questions that come out

1 within the proceedings, then that is another opportunity, as a
2 window, to be able to address any questions that you may have
3 at that time.

4 COMMISSIONER HOOD: I just wanted to put that
5 out there because as Mr. Wilson said, I want to make sure
6 we're even across the board.

7 MR. WILSON: Thank you.

8 MR. SOCKWELL: Madam Chair, I do believe that
9 testimony by Mr. Adolph could be substantial to determining
10 the direction that this case will take.

11 VICE CHAIR KING: In view of my colleagues'
12 opinions, I will withdraw my objection to Mr. Adolph
13 testifying.

14 CHAIRPERSON REID: So what did we do, just go
15 all the way around, back to where we began?

16 MR. WILSON: I think we did, but please know,
17 we did this out of respect for the Board.

18 CHAIRPERSON REID: Mr. Wilson, Mr. Wilson, now
19 that we've gone from this extreme to the other extreme and
20 we've kind of like beat it to death --

21 MR. WILSON: We're still going to make it
22 short.

23 CHAIRPERSON REID: Make it short. Just make it
24 short.

25 All right, Mr. Wilson?

26 MR. WILSON: Excuse me one moment, if I might,

1 please?

2 CHAIRPERSON REID: Okay. We've got a sidebar.

3 MR. WILSON: Thank you, Your Honor. We're
4 prepared to go forward.

5 Mr. Adolph? Do we swear the witnesses or do
6 you swear the witnesses.

7 CHAIRPERSON REID: Everyone was sworn in the
8 beginning.

9 VICE CHAIR KING: No, no.

10 MS. PRUITT-WILLIAMS: No. They were sworn
11 probably at the beginning of the first one. But I would
12 suggest we do it in case we have witnesses today. So anyone
13 who is going to be testifying on this case could you please
14 stand and raise your right hand --

15 CHAIRPERSON REID: Who has not been sworn
16 before.

17 (WITNESSES SWORN.)

18 MS. PRUITT-WILLIAMS: Thank you. Please be
19 seated.

20 TESTIMONY OF RONALD B. ADOLPH

21 MR. WILSON: Mr. Adolph, do you prefer to sit
22 or stand?

23 MR. ADOLPH: At this point, I don't know what I
24 prefer. I'll just try to be helpful and be brief and to sit
25 down is probably the best thing for me to do.

26 What I wanted to do and I guess I should start

1 by stating my name again for the record is Ronald P. Adolph.
2 I'm the Division President for Waste Management of Greater
3 Washington. I hold a degree in civil engineering and I've
4 been in the field of construction of solid waste management
5 for the last 18 years.

6 I was going to speak pretty extensively from
7 these boards and would like to, I guess my thought was to move
8 them closer. I don't know if you can see them or not.

9 VICE CHAIR KING: Can't see a thing.

10 MR. ADOLPH: Okay, well, maybe we can do that
11 very quickly.

12 (Pause.)

13 MS. PRUITT-WILLIAMS: Excuse me, Mr. Wilson,
14 will you be able to supply that for the record?

15 MR. WILSON: Yes, we'll make these -- yes.

16 MS. PRUITT-WILLIAMS: Will you be able to have
17 reduced size? That would be very helpful.

18 MR. WILSON: We have a booklet of reduced size
19 photographs for each of the Board Members.

20 MS. PRUITT-WILLIAMS: Okay, which is actually
21 what they will be seeing here?

22 MR. WILSON: Yes ma'am.

23 MS. PRUITT-WILLIAMS: So everything that
24 they're showing here will also be in your booklet?

25 MR. WILSON: If there is an exception we'll
26 either make a reduced sized one or make available to you the

1 large one.

2 MS. PRUITT-WILLIAMS: Okay, great, thank you.

3 MR. WILSON: I don't want to act prematurely,
4 but at the conclusion of this presentation we'll move the
5 admission of these exhibits.

6 CHAIRPERSON REID: Mr. Adolph, approximately
7 how much time do you think you'll need because you all are
8 over time.

9 MR. ADOLPH: I'm going to be hopefully very
10 brief, maybe 10, 15 minutes in that range, I believe.

11 CHAIRPERSON REID: And you think you can hold
12 it to 10?

13 MR. ADOLPH: I will make every attempt to do
14 that, ma'am.

15 Can you hear me okay?

16 CHAIRPERSON REID: Oh yes, very much so.

17 MR. ADOLPH: I just want to make a brief
18 statement and I'll get right into it. Waste Management is
19 the largest and most efficient solid waste company in the
20 world, serving residential, commercial and industrial
21 customers throughout the United States. We operate landfills,
22 recycling facilities, collection operations and transfer
23 stations. And of course, we manage the transfer station at
24 2160 Queens Chapel Road here in the District.

25 The site is currently owned by Caslin and
26 Associates. I took over the Washington operations about close

1 to five years ago, just about the same time our company began
2 to manage the facility, so I'm very familiar with the
3 operations.

4 What I'd like to do in just a few minutes of
5 your time and I appreciate the opportunity to speak to you is
6 just orient you to the site where it sits, briefly describe
7 what goes on there and very importantly how we comply with the
8 standards of external effects. And if you have any questions
9 I'll be happy to answer them.

10 So let me start by -- I'm going to try to hold
11 this with me so you can hear me. On this board, you can see
12 the major artery, New York Avenue, up in the top lefthand
13 corner. And this is Bladensburg Road. This is the corner
14 here of Bladensburg and New York Avenue. This direction is
15 going towards downtown and this direction is going out Route
16 50 and B-W Parkway. If you come up Bladensburg Road, you're
17 heading north, come under the underpass and the first lefthand
18 turn will put you on Queens Chapel Road which is this road
19 that runs along here. Our facility sits just at the
20 intersection of Queens Chapel and the railroad tracks. This
21 is our facility that sits in this square here.

22 MS. PRUITT-WILLIAMS: Excuse me, Mr. Adolph,
23 for the record, is that in here too?

24 MR. ADOLPH: This particular shot is not

25 --

26 MS. PRUITT-WILLIAMS: Shot is not in here.

1 MR. ADOLPH: I'm not going to spend a lot of
2 time on this. It's just a quick overview to get the major
3 roads and then we'll go to this photo which is the third photo
4 in the booklet.

5 MS. PRUITT-WILLIAMS: Thank you.

6 CHAIRPERSON REID: You will submit that for the
7 record?

8 MR. ADOLPH: Yes, we will.

9 CHAIRPERSON REID: Okay.

10 MR. ADOLPH: One of the things that's
11 interesting about looking at this shot is that you can see
12 kind of what's going on here in the whole community. You see
13 New York Avenue. You see rail running along here. This is
14 actually freight rail that runs along here. This is passenger
15 rail. And then Queens Chapel. You can almost see a nice
16 little triangle here between the two rail lines and Queens
17 Chapel. And if you note, everything on this side of the rail
18 is pretty much gray indicating industrial and commercial uses.
19 You have the Metro barn. You have a bunch of businesses and
20 operations, a concrete plant, a number of businesses on this
21 side. And on this side of the rail line, you see a lot of
22 green, indicating the residential community. Not to say there
23 aren't some commercial uses on this side of the rail, but for
24 the most part there is a natural barrier between the
25 industrial uses and the residential uses and you kind of see
26 that in cities all across the country, rail lines denoting

1 industrial -- a break between the industrial use and the
2 residential use.

3 Now you go to the third photo, you can also see
4 this shot in your booklet. This is a shot of Queens Chapel
5 Road running right along through the middle of the photo. So
6 Bladensburg Road would be at the top and our facility again,
7 here it is blown up, sits in this location. We actually own
8 or actually manage from this building and this building and
9 this yard. These three pieces make up Northeast Transfer.
10 This is actually the corner of Queens Chapel Road and Adams
11 Place that it sits on the corner of. Along Adams Place there
12 are several businesses. As was stated earlier the closest to
13 us is Custom Machinery that sits just here in front of one of
14 our buildings. This building used to be operated by a
15 professional records storage. It now is vacant and for sale.
16 These two buildings are operated by an auto body supply
17 company in this location. And these are four lots that are
18 pretty much vacant also, used to be operated by a paint
19 company and some other businesses.

20 This business also on the corner is also a
21 vacant property for sale. So there are basically two
22 operating businesses along Adams Place that we interact with.
23 Along Queens Chapel Road there's a new concrete batch plant
24 that came in after we were in place that sits across the
25 street. This used to be another transfer station operation
26 back in 1995 when we first came and was a pretty badly, pretty

1 poorly run operation that sat in this location and there are a
2 number of businesses along Queens Chapel.

3 This is a bridge that actually goes across the
4 rail line from the industrial side to the residential side.
5 You do see this site which operates here. It's operated by a
6 company called Rogers Brothers and it's pretty much an open
7 air construction and demolition site that is a very different
8 operation than what we do in terms of an enclosed trash
9 transfer station.

10 The residential community, the closest to us is
11 well over 300 feet and it begins here.

12 CHAIRPERSON REID: Approximately how many feet
13 would you say that is?

14 MR. ADOLPH: It's in excess of 300 feet and I
15 don't have the exact measurement. I can't say any more
16 definitive than that. I just don't know, but it is over 300
17 feet and the reason why that is is we knew that when we were
18 reviewing the text, the proposed text amendments and the fact
19 that they were proposing 300 feet and we knew that we exceeded
20 300, but I do not have an exact footage to give you.

21 COMMISSIONER HOOD: Madam Chair, I --

22 MR. ADOLPH: It's less than 500 feet if you're
23 asking that.

24 COMMISSIONER HOOD: I would like to recommend
25 that we use the base book so we can make sure that -- so we
26 won't have to approximate. But that's okay, the base book to

1 find out what the distance is from the facility to the nearest
2 resident.

3 CHAIRPERSON REID: You want staff to ascertain
4 that or do you want them to submit it?

5 COMMISSIONER HOOD: Staff could do that, right,
6 whoever can help us --

7 MS. PRUITT-WILLIAMS: If the Applicant has a
8 scale drawing, that would be helpful. It's hard to do from
9 the photos.

10 Is that from base --

11 MR. ADOLPH: This is base.

12 COMMISSIONER HOOD: Okay.

13 MR. ADOLPH: So again just to very quickly look
14 at this, what's highlighted in yellow is our operation. This
15 is Adams Place, Queens Chapel Road, this is the rail. And
16 residential would sit --

17 CHAIRPERSON REID: Why don't you turn that --

18 MR. ADOLPH: Same orientation?

19 CHAIRPERSON REID: Yes, same orientation so we
20 can see it better.

21 MR. ADOLPH: This is Queens Chapel running up
22 and down.

23 CHAIRPERSON REID: Right.

24 MR. ADOLPH: So you have --

25 VICE CHAIR KING: But according to this one,
26 this is the one where we can see the residential --

1 CHAIRPERSON REID: Same orientation.

2 COMMISSIONER HOOD: I just basically want the

3 scale. We need the scale, that's all, that's all I'm asking

4 for.

5 MR. ADOLPH: That's about as close as I'm going

6 to get it to that.

7 CHAIRPERSON REID: At least we're looking at

8 the same orientation.

9 MR. ADOLPH: Right.

10 CHAIRPERSON REID: The residential area is --

11 MR. ADOLPH: Right, this is rail, rail, Queens

12 Chapel Road, coming down across, past us, across the bridge,

13 down into the residential site which is over here. We are

14 measuring from --

15 VICE CHAIR KING: What's the scale?

16 MR. ADOLPH: The building -- the face of the

17 building.

18 COMMISSIONER HOOD: You're supposed to measure,

19 I believe, from the lot line.

20 CHAIRPERSON REID: Mr. Adolph --

21 MS. PRUITT-WILLIAMS: You measure from the edge

22 of --

23 CHAIRPERSON REID: Mr. Adolph, this question is

24 fairly important.

25 MR. ADOLPH: Yes ma'am.

26 CHAIRPERSON REID: Because that has some basis

1 for the decision that we make, so I don't want that to be
2 trivialized. I need to know specifically how far your
3 facility is from the residential area. You're a civil
4 engineer.

5 MR. ADOLPH: I'm a civil --

6 CHAIRPERSON REID: You can't look at that and
7 ascertain that for us?

8 MR. ADOLPH: I could, ma'am, if I had a scale,
9 but I don't.

10 MS. PRUITT-WILLIAMS: What do you need, an
11 engineering scale?

12 CHAIRPERSON REID: Isn't that a scaled drawing?

13 MR. ADOLPH: It may not be.

14 MS. PRUITT-WILLIAMS: Do you need an
15 engineering scale or an architectural --

16 MR. ADOLPH: Let me see if I can add up some
17 distances for you because it's --

18 MS. PRUITT-WILLIAMS: Mr. Adolph, I have scales
19 for you, that's what I'm asking. Do you need engineering,
20 architectural or metric.

21 MR. ADOLPH: I need to know what the scale is -
22 -

23 MS. PRUITT-WILLIAMS: Scale is on the drawing.

24 MR. ADOLPH: Was the drawing blown up in scale
25 or just to fit the sheet. If it's blown up just to fit the
26 sheet, then you're going to have to take a measurement and

1 approximate.

2 COMMISSIONER HOOD: Madam Chair, I didn't ask

3 that question for us to belabor the point now, but I mean

4 before any final decision I would like to have the scale.

5 CHAIRPERSON REID: Leave the record open for

6 you to submit a scaled drawing showing the --

7 MR. ADOLPH: I think the easiest thing to do is

8 --

9 CHAIRPERSON REID: -- distance of the

10 residential area from your facility.

11 MR. ADOLPH: I'm sorry, Madam Chair.

12 COMMISSIONER HOOD: Also, Madam Chair, I would

13 like for also us to come up with what the scale is as opposed

14 to Mr. Adolph.

15 MS. PRUITT-WILLIAMS: You mean you would like

16 for staff to provide you a drawing?

17 COMMISSIONER HOOD: Exactly. I would like for

18 Mr. Adolph to do it also and also staff.

19 CHAIRPERSON REID: All right, thank you.

20 COMMISSIONER HOOD: That's fine.

21 MS. RAY: Excuse me, the Government just wants

22 to note one small objection. For a moment here I'm feeling

23 like we're in a use variance hearing and although the Board

24 has overruled our previous objection that Mr. Adolph should

25 testify and that's fine, or present a presentation, but if

26 we're just deciding whether what they put on their application

1 at the time, entitled to a C of O as a matter of right, is to
2 me kind of getting away from the issue by us going to scale
3 and all that. That's almost getting to where they should,
4 what they could have done when they were given the decision
5 was come here for a variance and they chose not to do that and
6 we're almost giving him the benefit of that without having to
7 do it. And so the Government just needs to note another
8 objection that the scale and all that stuff still -- does it
9 go to the issue of whether the Zoning Administrator was
10 correct in denying them and directing them to you which now --
11 which you would be doing this very --

12 CHAIRPERSON REID: Okay, point well taken.
13 Sustained. However, the Board Members have made a request and
14 we would like to have that request honored.

15 COMMISSIONER HOOD: Also, Madam Chair, when I
16 said I wanted to hear from Mr. Adolph, the point is well
17 taken, like you said, but I also don't want to be going into
18 something that we shouldn't be going into at this time. My
19 comment at that time was strictly to just let you know, up
20 front, that I was eventually going to get around to the point
21 of asking Mr. Adolph some questions when we had the time, to
22 keep it even across the Board because of the statement that
23 Mr. Wilson had made.

24 CHAIRPERSON REID: Okay.

25 COMMISSIONER HOOD: That's all I was saying. I
26 don't want to get into something that we don't necessarily

1 need to get into.

2 MR. ADOLPH: Sure. And I think the point is
3 well taken by counsel and we didn't come prepared to go
4 through a detailed zoning analysis of where we sit on the regs
5 that applied after our application, but that's fine. It gives
6 us an idea.

7 The facility itself, some of the things to
8 point out, because it speaks -- I'll go right to the point at
9 hand, which is actually the compliance with standards of
10 external effects.

11 With respect to the standards we submitted with
12 our 1995 C of O, as Mr. Wilson and Mr. Mishkin have mentioned,
13 how we intended to comply, whether or not --

14 MR. SOCKWELL: Mr. Adolph, before you go with
15 compliance to standards of external effects, just explain what
16 you do in the facility.

17 MR. ADOLPH: Okay, that's fine. Be happy to do
18 that.

19 In the facility itself -- I want to -- I'll
20 start it this way and make a couple of points. The first
21 thing that I want to mention is that in agreement and
22 discussion with the community, we made a decision that
23 different than how the site operated before we got there, that
24 we would only feed this site with trucks from Bladensburg
25 Road.

26 So, the first thing to note is that as we

1 talked about that natural barrier of being the rail, all the
2 trucks that come with trash to this facility or come to take
3 trash away from the facility all come from Bladensburg Road.
4 So, they would come down Queens Chapel Road, and a collection
5 vehicle, a garbage truck, if you will, would come down Queens
6 Chapel and make a left-hand turn into the yard.

7 Once it gets in the yard, the trucks actually
8 line up in a circular manner, and they go on to a scale that
9 sits here at a scale house. Those trucks will weight in, and
10 we record by computer an inbound weight, and we direct those
11 trucks through this opening into this enclosed structure.
12 This building that sits here is the building where we actually
13 conduct the operation.

14 The truck goes into this enclosed building and
15 actually raises the bed and tips its load onto the floor, and
16 thus the term "tipping floor." There are about three or four
17 gentlemen at any given time in here that direct trucks for
18 safety and inspect loads.

19 As these trucks come in, because of the nature
20 of our business, although every contract we have with every
21 commercial customer, residential customer specifically states
22 what can go into municipal solid waste collected trash and
23 what can't, we know that from time to time people
24 unfortunately place things that are inappropriate in the trash
25 anyway.

26 So, we have three or four spotters in here that

1 spend all day long just looking through the trash, looking to
2 see if there's anything that might look like medical waste,
3 some other sort of special waste that should not be in the
4 trash, and if we find that stuff, that stuff is pulled to the
5 side and handled separately.

6 The trash is tipped onto the floor, and there
7 are two pieces of heavy equipment inside this building. One
8 is a front-end loader that pushes trash from this end of the
9 building down to this end of the building. And the reason why
10 that is, as you can see, there's a tractor trailer heading in
11 in this picture. This is the end of the building where we
12 load the outbound trash. The front-end loader pushes that
13 trash down and creates a pile.

14 And there's an excavating piece of equipment.
15 It's just a big -- looks like a crane, and it has a grapple,
16 looks like a big hook, and it just pivots back and forth, and
17 all it does is pull trash up out of the pile, turn, and drop
18 it into the top of a tractor trailer, of a trailer. All
19 right?

20 The inbound vehicles -- stick with those for a
21 second -- once it tips its load, it comes back out into the
22 yard, goes back up on the scale, and we record the empty
23 weight. And then that vehicle exits. When it gets to this
24 exit, there's a sign that says "no left turn." We have people
25 that monitor that. We never have any of our trucks that leave
26 this facility make a left turn and go across this bridge into

1 the residential neighborhood. They all make a right-hand
2 turn, go down Queens Chapel, and proceed back to Bladensburg
3 Road and about their business.

4 Again, when these trucks come in, they're asked
5 questions at the scale: Have you been anywhere where you
6 could have picked up any medical waste or any other kind of
7 waste? Those questions are asked. If there's any question,
8 then those trucks are given special attention inside the
9 building.

10 The outbound vehicles also come down Queens
11 Chapel Road. They turn left on Adams Place, and if it's a
12 situation like this where relatively light at this time, that
13 truck will pull directly into this portion of the building and
14 sit there to be loaded.

15 If there are already trucks here -- in this
16 picture, you can see two trucks coming out and one heading in
17 -- then what we can do is we have made arrangements -- and
18 this is something different also than from when we first got
19 there -- we own half of this driveway, and we lease the other
20 half from this building.

21 So, we can control this driveway, and we
22 actually bring trucks down past our buildings into this
23 driveway, and you can see three of them sitting here. We can
24 queue up a stack of trucks along this driveway.

25 So, one of the main things that we looked at
26 correcting is when we got there, there were trucks queuing up

1 on the road from this direction across the bridge, queuing up
2 from this direction on Queens Chapel, lined up on Adams Place.
3 All vehicles, as they come to our site now, inbound vehicles
4 can queue up in the yard, outbound vehicles, along this
5 driveway, and we feed them in under our management team out
6 there that operates the facility.

7 You asked why we do this. We basically reduce
8 trash on about a five to one basis; meaning, for every five
9 small vehicles that come in, we fill up one tractor trailer.
10 That's about what it averages. So, we may have about 180 to
11 200 trucks in any given day coming to this facility. Those
12 are trucks that are operated by Waste Management and other
13 independent haulers and carters here in the District of
14 Columbia. And we reduce those to about 35 to 40 outbound
15 vehicles.

16 One of the things that we want to know that
17 this is something that goes on in every city across the
18 country. The reason being is that landfills, which is the
19 primary way we dispose of trash in this country, is normally
20 in an area where there's a lot of cheap land. That tends to
21 be rural areas that are far from urban centers. If the
22 landfill is not far or if there is a final disposal facility
23 that's not far, then these inbound vehicles can go directly to
24 the final disposal facility. But if they are a great
25 distance, like the landfills down in Virginia, for instance,
26 then we would have to put six times, or five or six times as

1 many trucks on the road to send all those trucks on a six-hour
2 turn down to a landfill and back. It would add a great deal
3 more expense to the operation, which would be passed on
4 obviously to the people that we do business with and throw the
5 cost of trash out of whack in the District of Columbia.

6 What I guess I want to say is that there's a
7 system of disposal throughout the country. You have
8 landfills, waste energy plants, final resting places, and
9 anyplace where you can't there and do that in an efficient and
10 an economic manner, transfer stations pop up, and that's a way
11 to get there.

12 Transfer stations have been in the District of
13 Columbia for years, as Mr. Mishkin spoke to, all this trash
14 used to go through the District's transfer stations. And in
15 the mid-90's due to some legal ramifications and other
16 decisions, the District ceased to take this trash. So, then
17 something had to be developed, and that's how private transfer
18 stations started to pop up, and at that time, we entered into
19 the process of trying to get this facility and other
20 facilities by other companies properly licensed and permitted.

21 That essentially is the operation that occurs
22 at Queens Chapel Road.

23 CHAIRPERSON REID: Are you -- does that
24 conclude your presentation?

25 MR. ADOLPH: I just wanted to make a couple
26 comments about external effects, if I can, all right?

1 CHAIRPERSON REID: All right.

2 MR. ADOLPH: Under section 804. -- under the
3 Scope of Standards for External Effects, 804.1 thorough 804.7,
4 all speak to sound -- and I'll just group them all together
5 and make one statement. They talk about unloading, transfer
6 processing, and loading operations, the sound that that makes.
7 It talks about intermittent sound. It gives an octave band
8 chart to measure sound, and it talks about sound generated at
9 the zone boundary lines.

10 We have addressed all the sound considerations
11 by tightening up and redoing this building. This building had
12 broken windows, had doors missing, had openings in the block
13 walls and concrete. We took care of all that stuff, and we
14 have -- we contained the sound in that building within levels.
15 We haven't had any complaints about sound emanating from the
16 structure. So, we monitor sound by keeping the building
17 operating in the way it should.

18 The next section was 804.8, which is the
19 Ringelman Smoke Chart, it doesn't really apply. We don't
20 incinerate trash. We don't do anything to create a level of
21 smoke that we would have to measure, and I think, if I
22 remember correctly from our report, it's like a level two on
23 the Ringelman Smoke Chart.

24 804.9 speaks to Key Point, Offensive Odors at
25 the Zone Boundary Line. And I just want to state that I'm
26 talking about what the regulations say, and the regulations

1 talk about the zone boundary lines. So, if you go to the
2 boundary of the CM zone, which basically takes you over here
3 to the residential area, we are well within compliance in
4 terms of controlling odor within the zone boundary lines.

5 We go much further with odor, because it's a
6 key issue. We have installed a negative air pressure system
7 in this building. I can get into all the details of how it
8 works, but suffice it to say, it filters for dust, and it
9 filters for odor. It's state-of-the-art. You will not find
10 one in any other transfer station in this city. You won't
11 them in many transfer stations across the country, but it's
12 something that we suggested and we put in here and we're
13 utilizing at this facility.

14 We also have another system of dispersing a
15 deodorizing agent that actually breaks down odor molecules and
16 then adds a light fragrance. We have 84 nozzles within this
17 building, and we have nozzles all around the perimeter.

18 And I'll say this to you, point blank: I've
19 been out in that -- working with this facility for five years,
20 and when I got there, we had complaints from some of the
21 citizens. I have not and we have not, at our facility,
22 received a complaint from a resident in this community in well
23 over a year and probably longer.

24 Now, that's not to say that -- you know, we
25 talk about the regulatory structure and what goes on with
26 that; that's something different, and we can speak to that.

1 But in terms of working with the residential neighbors, our
2 commercial neighbors, we have not had a complaint from the
3 residential group.

4 The last part of the external effects, 804.10
5 through 13 speaks to fumes, dust, glare, and ground vibration.
6 There, again, we don't do any incineration, so the glare and
7 the fumes are not really an issue. There is not any excessive
8 ground vibration to speak of.

9 In terms of dust, when we got there, this whole
10 yard was basically a dust bowl. The floor had broken down
11 completely inside the building. The floor has been restored
12 inside the building. This yard has been completely repaved.
13 Proper storm drainage systems have been put in to carry the
14 washwater off this floor. Another way we control odor is by
15 washing down this floor on a periodic basis. Those are the
16 things that we do to control dust and odor.

17 I think that the key thing to note also is that
18 this is not a final resting place for trash. Trash comes into
19 this building, and it stays, on average -- once a truck is
20 dumped, that trash stays in our facility for approximately 120
21 minutes, and it's gone. And by the end of the day, all trash
22 leaves this building. The building is swept clean, and it's
23 ready to go for the next day. And that's the main way that we
24 keep odor and external effects to a minimum with this
25 facility.

26 In term of just -- if I can -- if you'd just

1 bear with me one moment -- in terms of the community, I just
2 want to say a little bit more; that we have been in contact
3 with the ANC over the years. We've been in contact with
4 Woodridge Civic Association. We've been in contact with
5 informal groups -- the Douglas Street Block Club, Langdon
6 Elementary School, the Dwight Moseley Memorial Fund, and we
7 were instrumental in doing a bunch of things with them in
8 terms of restoring the parks. We've worked with everybody out
9 there.

10 We've worked with commercial businesses, and
11 we're prepared to show, if it hasn't already been entered;
12 maybe the attorneys have already entered it into evidence --
13 that we have support out there. We have letters of support
14 from businesses. We have letters of support from well over 50
15 residents out there that are saying Waste Management, over the
16 years, that's been out here has complied with external
17 effects; they have done what they said they were going to do,
18 and they have worked with us. And we're real proud of that
19 record.

20 That's what our company is all about is trying
21 to -- and we operate 1,200 facilities across the country, and
22 in all those jurisdictions it is our goal to blend in and to
23 work well with the community with facilities such as this that
24 are tough to operate.

25 I'll just close --

26 MS. RAY: Excuse me, can I just object. We've

1 gotten off track now. I know -- I beg your respect and
2 pardon, but I know we've gotten off track with the time frame
3 and working with the community. We're looking at more things
4 than the ZA had in front of her at the time.

5 And my name is Venita Ray -- I'm sorry, I keep
6 forgetting to say my name -- and on behalf of the government,
7 I'd just like to object. We're dealing -- community letters
8 and petitions are all fine, but that is not what the ZA had in
9 front of her at the time that she had to decide this
10 application.

11 And I still submit that Waste Management could
12 be here doing the variance hearing with you right now and the
13 public could be talking, but they chose not to. And most of
14 this presentation is not relevant to the issue of whether they
15 are entitled to a C of O as a matter of right. Thank you.

16 MR. ADOLPH: On that note, I will close and say
17 that I think that we were -- should have been granted our C of
18 O as a matter of right in 1995 and respectfully ask for you to
19 do so at this time.

20 Thank you for your time. And if there any
21 questions, I'll be happy to answer them.

22 CHAIRPERSON REID: Very quickly, Mr. Adolph,
23 before you sit down, did you say that you had the support of
24 the ANC?

25 MR. ADOLPH: No, I did not say that we had -- I
26 know that there's been a letter that's been entered by the ANC

1 in protest. We made an attempt to meet with the ANC in recent
2 times. We had two meetings scheduled that were canceled. I
3 understand there's some staffing issues and some other
4 problems. We were surprised to hear that they had an
5 emergency meeting or some sort of special meeting September
6 that weren't invited to after we had been trying to meet with
7 them.

8 So, what we did is decided to just do our own
9 informal work and go out and talk to the residents and talk to
10 the businesses, and that's how we ended up with the letters of
11 support. We didn't even --

12 MR. BASTIDA: Madame Chairperson, the staff
13 advises you that that doesn't have any relevance regarding the
14 appeal and that the testimony should not be taken into the
15 record.

16 CHAIRPERSON REID: Well, he answered my
17 question.

18 MR. HOOD: Madame Chair, I would like to concur
19 with staff. I think there were some issues that were raised
20 for which I have questions. But, again -- I go back to my
21 statement earlier -- this is not the proper time. I think
22 it's time for us to move on and deal with the case at hand.
23 Thank you.

24 MR. SOCKWELL: Mr. Adolph, one question. You
25 apparently have done a lot of thing for external effects, but
26 what was the -- you said you had changed the operation over

1 the time that you've had it. When you first acquired the
2 facility, what was the operation?

3 MR. ADOLPH: The operation was still
4 essentially the same operation. It was receiving and
5 transferring trash. The only difference I guess between the
6 entity that was doing it before us and Waste Management is
7 we've been doing it for well over 25 years and have a lot of
8 experience with how to best and most efficiently operate a
9 trash transfer station.

10 So, there were some things that were occurring
11 that were unfortunate in terms of queuing along the roads and
12 some of the trash spilling out of the building or not be
13 cleared out every night and the facility not being in the best
14 condition it could be in and odor controls and those sort of
15 things that we got into.

16 And, again, it's been -- I'll just say this to
17 you, Mr. Sockwell -- it's been difficult to be in a sort of
18 temporary situation out here as a company and make the number
19 of improvements that we'd like to, but we've made well over \$1
20 million worth of improvements since the time we've been out
21 there.

22 MR. SOCKWELL: I understand what you're saying.

23 Do you -- you said you take in virtually any
24 kind of trash that comes your way?

25 MR. ADOLPH: No, that's not correct.

26 MR. SOCKWELL: No.

1 MR. ADOLPH: We handle a specific class of
2 trash known as municipal solid waste.

3 MR. SOCKWELL: Which is strictly --

4 MR. ADOLPH: That's household and commercial-
5 generated trash only. We do not take in any special waste,
6 such as asbestos. We don't take in any medical waste. We
7 certainly don't take in any hazardous waste.

8 I only said to you that unfortunately in this
9 business the reality is that from to time these sorts of
10 things can show up in our waste stream, and we have to monitor
11 very closely for that to make sure it doesn't end up being
12 transferred down to our landfills.

13 MR. SOCKWELL: You don't separate anything
14 within the facility.

15 MR. ADOLPH: Our basic option is -- our basic
16 operation is to consolidate trash onto these trucks. We do --
17 with the questions that we ask, the procedures we have in
18 place at the scale house, that's our first screening. If
19 someone says, "Yes, I serviced a building that has a medical
20 provider in there," that's an automatic signal to break that
21 load open. And when I say break it open, the load is
22 compacted in the vehicle, so it actually comes out like a
23 cube, and we have to break that load open and actually search
24 through it to see if there's anything in it.

25 And an ongoing basis, all trash that comes
26 through the facility, we have spotters in there that are just

1 all day long looking. If anything looks suspicious, stop the
2 operation, isolate the item, move it to the side, and it's
3 examined for how to properly handle whatever it is that we
4 might have located.

5 MR. SOCKWELL: So, all the material that comes
6 through is going to be going to a landfill or

7 MR. ADOLPH: Or a -- in this case, I'd say 95
8 percent of it is going to landfills. There is, from time to
9 time, we do take some to waste energy plants. There's one in
10 Baltimore that we utilize, and on occasion we have gone to
11 Lorton.

12 MR. SOCKWELL: Okay. But that would be the
13 only other designated destination, generally.

14 MR. ADOLPH: Right. I'm not sitting here
15 trying to limit where we might take stuff. I'm just telling
16 you at present. There is also an attempt from time to time,
17 depending on our -- the volume in the building and the
18 operation, we do pull out some recyclables. We may pull out
19 cardboard; we may pull out even some other items, and those
20 would be shipped to a recycling facility.

21 I just want to note for the record if you're
22 asking what do we do with the items that are pulled out that
23 are inappropriate, they do not go to landfills.

24 MR. SOCKWELL: No, that wasn't really my
25 question. Thank you.

26 MR. ADOLPH: They go to wherever they need to

1 be handled.

2 CHAIRPERSON REID: Thank you, Mr. Adolph.

3 MR. ADOLPH: Okay, thank you.

4 MR. WILSON: Ms. Reid, this ends the direct
5 portion of our presentation. I did want to state that those
6 letters and/or petitions that have been signed by various
7 citizens and businesses -- some of whom cannot be here, some
8 of whom can -- we think are as appropriate as any citizen or
9 business' right to comment on this.

10 We'd also, at this time, like to move the
11 admission of these exhibits and the photograph booklet, if
12 there's no objection.

13 CHAIRPERSON REID: Okay, thank you.

14 MR. WILSON: And then, finally, if I might,
15 I've received today a statement from a Mr. Robert King who is
16 an advisory commissioner at ANC-5A12, and rather than -- I
17 don't want to unduly take up the time of this Board, but I
18 would like to have it submitted for the record and obviously
19 make a copy available to Ms. Ray.

20 CHAIRPERSON REID: We have to -- yes?

21 MR. HOOD: Madame Chair, I believe that the ANC
22 commissioner -- the Commission has taken a vote. I haven't
23 even seen the letter, but I think that that would substantiate
24 what the ANC's position is especially since I believe 5A12 is
25 not within this boundary. I think we need to stick with the
26 ANC who has already submitted, because it's within that

1 boundary. And, by law, we have to give the ANC as a whole
2 great weight.

3 MR. WILSON: And what I would say respectfully,
4 I don't dispute for a moment what Mr. Hood has said about what
5 the ANC vote was. I was not present. But this is a statement
6 from an ANC commissioner who is not present who questioned the
7 process. I'd just ask that the record be complete.

8 CHAIRPERSON REID: But is ANC -- well, that,
9 Mr. Wilson, can be taken in regular testimony.

10 MR. WILSON: Okay. So, we should hold this at
11 this time?

12 CHAIRPERSON REID: Well, yes, because the ANC
13 proper has already submitted their position, and that -- there
14 will be a segment for the ANC, and at that time if you'd like
15 to --

16 MS. PRUITT-WILLIAMS: That actually can just be
17 submitted as an individual who happens to be an ANC
18 commissioner testifying since it is not the official -- the
19 affected ANC nor does it carry the weight of a quorum in great
20 weight. So, it's just another individual who happens to be an
21 ANC commissioner who is testifying --

22 CHAIRPERSON REID: So, that would not be
23 submitted at the time of the ANC segment, necessarily?

24 MS. PRUITT-WILLIAMS: No, because --

25 CHAIRPERSON REID: Okay.

26 MS. PRUITT-WILLIAMS: No, it doesn't sound like

1 it has standing. It's just this person; that's his capacity;
2 he's writing in that capacity as an individual.

3 CHAIRPERSON REID: A person in support.

4 MR. WILSON: In sum, he is a person whose
5 statement may be taken at the time we take statements of other
6 --

7 MS. PRUITT-WILLIAMS: General testimony,
8 correct.

9 CHAIRPERSON REID: Okay. All right.

10 MR. WILSON: And I do want to note that this
11 gentleman was in fact present at the ANC meeting. We will
12 submit it at that time, and we appreciate your patience.

13 CHAIRPERSON REID: Okay.

14 MS. PRUITT-WILLIAMS: Actually, you can submit
15 now. It's just for the record, so it's --

16 MR. WILSON: Well, if the Board permits, I want
17 to --

18 MS. PRUITT-WILLIAMS: It's just general
19 testimony.

20 CHAIRPERSON REID: It's now submitted?

21 MR. HOOD: I will withdraw my comment, and --
22 fine.

23 MR. WILSON: Thank you, Mr. Hood.

24 MS. RAY: Again, Venita Ray, on behalf of the
25 Government would just object to its relevance.

26 CHAIRPERSON REID: Okay.

1 MR. WILSON: Is the Board's pleasure to
2 commence the cross examination now of Mr. Adolph or to start
3 at --
4 CHAIRPERSON REID: No, I think if you've --
5 have you concluded your presentation?
6 MR. WILSON: Yes, ma'am.
7 CHAIRPERSON REID: Okay. The cross
8 examination, then, we'll hold until after we've had lunch.
9 VICE CHAIR KING: You're going to cross
10 examine?
11 MR. WILSON: No, no, no, ma'am. I'm not going
12 to cross examine my own witness.
13 CHAIRPERSON REID: No, the Government will get
14 an opportunity to cross examine.
15 We're going to recess now for lunch and come
16 back at two o'clock? Is two o'clock good for everyone? At
17 two o'clock we'll resume, and then the Government will have
18 their opportunity to do their cross examination, and then
19 we'll proceed with the --
20 MR. WILSON: And there be closing statements at
21 the end?
22 CHAIRPERSON REID: Yes, you have a rebuttal and
23 closing statements, yes.
24 MR. WILSON: Thank you very much.
25 (Whereupon, the foregoing matter went off the
26 record at 1:12 p.m. and went back on the record at 2:11 p.m.)

1 CHAIRPERSON REID: This meeting will come to
2 order.

3 Ms. Ray? Venita Ray? Are you going to do
4 cross examination?

5 MS. RAY: No, the Government has no cross
6 examination for Mr. Adolph.

7 CHAIRPERSON REID: All right. Do you have any
8 cross examination of any of the witnesses?

9 MS. RAY: No, the Government has no cross
10 examination.

11 CHAIRPERSON REID: Okay. All right, we move
12 now to zoning administrator and witnesses of the appellate --
13 I'm sorry it's other Government officials. The zoning
14 administrator and other government officials.

15 Where is Mr. Johnson?

16 MS. RAY: He was here a moment ago.

17 CHAIRPERSON REID: Mr. Johnson?

18 MR. JOHNSON: Good afternoon, Madam Chairwoman,
19 members of the BZA. I'm Michael D. Johnson, the newly
20 appointed -- as of August 2, the newly appointed Zoning
21 Administrator. I would just like to take a moment to make a
22 statement on behalf of the city at this time.

23 And, simply, I've had an opportunity to review
24 the documents and the regulations with respect to this case
25 and particularly wish to convey to the Board that -- make a
26 statement on the merits.

1 Basically, I can concur with my previous
2 predecessor's zoning interpretation letter that was sent back
3 to the applicant. That letter was date February 2, 1996.
4 However, I wish to differ in one area, and that is simply to
5 say that if I had been in that capacity at the time, I would
6 have simply and quickly deferred or referred the applicant to
7 this body and directed them to seek a variance.

8 With respect to the second application -- I
9 believe that was the name change -- it's my understanding the
10 BZA has already revoked it, and thus the Agency had nothing
11 else to issue in that case.

12 That concludes my statement at this time.

13 MR. WILSON: Cross examination.

14 CHAIRPERSON REID: Well, do you want to wait
15 until the conclusion of their presentation before cross?

16 MR. WILSON: I was going to cross examine them
17 one at a time as they come up, but whatever the normal
18 procedure is is what we'll do.

19 CHAIRPERSON REID: Let's allow them to put on
20 their case, and then you can cross.

21 MR. BASTIDA: That other microphone should be
22 turned on.

23 MS. RAY: Okay. Good afternoon, ladies and
24 gentleman of this Board. My name is Venita Ray, and along
25 with my colleague Musa Eubanks, we represent the Government in
26 this case.

1 First of all, I just want to say that the issue
2 in this case is very simple. The issue is simply whether the
3 zoning administrator on behalf of the Building and Land and
4 Regulation Administration was correct when she denied Waste
5 Management's application for a C of O and directed them
6 instead to seek a variance from this Board.

7 In fact, if Waste Management had sought a
8 variance at that time, we probably wouldn't be here today.
9 Waste Management is not a hauler or a carter. They operate a
10 trash transfer station, as they have presented testimony to
11 that fact. There were no zoning regulations in effect at the
12 time that allowed a solid waste handling facility.

13 The Government submits that if, as you know
14 and which has come up a little bit in this hearing today, that
15 there were later zoning amendments promulgated that made trash
16 transfer stations a special exception classification, and the
17 Government submits that if Solid Waste's handling facility was
18 noxious enough or it had such type of adverse effects on the
19 environment and the community in 1998 for the Zoning
20 Commission to promulgate regulations, it was no less hazardous
21 and noxious in 1995. And, therefore, the zoning administrator
22 was correct by refraining from making a decision and deferring
23 to this Board instead.

24 The Government's position is that solid waste
25 handling facilities are not entitled to C of O as a matter of
26 right in 1995 just like they're not entitled to a C of O as a

1 matter of right today.

2 The zoning regulations that are in place then,
3 as now, are in place to protect the health, safety, and the
4 public, and, as such, no one can deny that there's adverse
5 effects that emanate from this type of operation. And the
6 zoning administrator as well as this body is charged with
7 ensuring the health and safety of the community.

8 We all know that and we cannot deny the fact or
9 look at this case with blinders on to ignore our common
10 knowledge and our common sense that solid waste handling
11 facilities have characteristics and as indicated in the zoning
12 administrator's decision, dated February 21, 1996, that they
13 have characteristics that are not contemplated in the zoning
14 regulations at the time, and should be decided by this Board
15 but also have characteristics that are similar to other
16 prohibited uses in the District. And if there was such a
17 question in her mind at the time and within the Agency, it was
18 appropriate for her and for the Agency to defer that decision
19 to this Board. It is not the Government's position that Waste
20 Management may not be entitled to a C of O. It is only our
21 position today that this body should be the one to decide
22 whether they were entitled to their certificate of occupancy.

23 So, again, it is the Government's position that
24 the zoning administrator was correct when she denied Waste
25 Management their C of O and directed them instead to seek a
26 variance from this body. And in fact the testimony today has

1 basically been similar to either special exception or a
2 variance hearing that we believe is appropriate in this matter
3 and should have been deferred to you and should have been held
4 and appealed -- excuse me, applied for by Waste Management.

5 On the second application in this matter that
6 we're talking about, the Mike Perkins C of O, or the previous
7 C of O from the previous owner, when Waste Management came
8 into the Agency November 21, 1995, they were aware, as this
9 Board had made a bench decision that that C of O was revoked.
10 Nobody sought a stay at that time.

11 They of course have the right to go to the
12 court of appeals, but nobody submitted a motion for a stay to
13 maintain the status quo even though in fact Waste Management
14 has continued to operate. They haven't been harmed by having
15 to seek this hearing. As a matter of fact, they should have
16 sought it long ago. But the Mike Perkins C of O is dead, it's
17 gone. The Agency was correct when they denied the reissuance
18 of that C of O because in effect there was no C of O to
19 reissue.

20 So, that matter, the Government submits, is
21 moot before this Board even though it's on appeal to the court
22 of appeals, because no one applied for a stay in that matter.

23 What the Government would request from this
24 Board at the end of this day is that you uphold the zoning
25 administrator's decision denying the C of O as a matter of
26 right and that a variance was the appropriate remedy in that

1 instance.

2 And even if you say that maybe they should have
3 gotten it -- there's been a lot of testimony about whether the
4 standards of external effects applies. Well, it's strange --
5 first, Waste Management says it doesn't apply, then they say
6 it does apply, then they say but if it applies, we meet it.
7 Well, there's been no determination as to whether or not they
8 meet it or not.

9 The Government's position has always been the
10 standard of external effects applies, and the Agency is the
11 one to determine whether they comply or not. And if in fact
12 they're entitled to the C of O as a matter of right, then the
13 Agency should be allowed to make that determination.

14 The evidence that the Government will put on
15 today will show that the Agency was charged with interpreting
16 and administering the regulations made a decision that a trash
17 transfer station, the use, was not contemplated in the zoning
18 regulations. They're the agency that interprets the
19 regulation. They are the agency in charge with the expertise,
20 the knowledge, and they do this for a living; that's what they
21 do.

22 We'll have expert testimony that the
23 characteristics of a solid waste handling facility are so
24 similar to some of the characteristics present in the
25 prohibited uses that the zoning administrator was correct in
26 her determination that this body was the correct body to make

1 that determination of whether or not they should be allowed to
2 operate.

3 We'll also show you pictures, and we'll show
4 you some other evidence and testimony that this is a trash
5 transfer station that we're talking about. As we all know
6 that -- and I believe it was 1993 -- that the Zoning
7 Commission promulgated regulations making a recycling
8 facility, as Mr. Sockwell has alluded to today, a recycling
9 facility as a special exception classification. Well, if a
10 recycling facility requires a special exception classification
11 and it's not even involved in the type of decomposing trash
12 that we're talking about, how is it that a solid waste
13 handling facility would not require some greater oversight
14 than an over-the-counter C of O.

15 We will present testimony that gives you an
16 idea of what goes on here. We know that Mr. Adolph has
17 testified and showed and told you that they dumped trash, but
18 we would like the Board to really see what goes on here and
19 why it is that the zoning administrator was correct when she
20 said that "This was not the kind of use I can make a decision
21 about. The Board of Zoning Adjustment should make this
22 decision."

23 In addition, we have -- you will hear us also
24 talk about we're going to present evidence by Government
25 officials who are in the position to make decisions on this
26 kind of matter and by inspectors who have went out to the

1 facility numerous times, cited them for odor tickets, and all
2 of the kind of things that Waste Management will contend that
3 they comply with.

4 Now, we don't deny that what the service that
5 Waste Management may provide is a needed service or that they
6 do a good thing, and we need to have these kind of facilities.
7 We only submit that they're -- the type of facility that they
8 have should be regulated appropriately, and sometimes the
9 decision requires this body to make instead of the Agency, and
10 that's all we're saying. Again, the Government will ask that
11 you uphold the ZA's decision.

12 And in response to Waste Management's claims
13 that they have been harmed or should they make any claim,
14 they've operated since 1995 over there without a C of O. We
15 all know that that's illegal. The regulations require a
16 certificate of occupancy as a condition precedent to operating
17 a business, to occupying a structure that's not dwelling.

18 They claim that, well, we did a good thing. We
19 came in the door; we put what we were going to do on the
20 application, so you should give us credit for it. I don't
21 think we should give them credit for doing what they were
22 legally obligated to do. Just because they put carting and
23 hauling in the front of solid waste handling facilities didn't
24 change the nature of the use they were asking to use it for.
25 You don't get credit for following the law. You are expected
26 to follow the law.

1 There's been a lot of testimony about the
2 interim operating permit, and just to make there's no
3 confusion, it wasn't DCRA or the zoning administrator changing
4 the rules. We all know the history of solid waste in the
5 District. The rules were changing by the Zoning Commission
6 and the City Council. It wasn't DCRA changing the rules.
7 Things were changing; things were evolving in the District.
8 It wasn't their choice that the rules changed. The rules were
9 changing, and DCRA had to adjust for the rules as well as any
10 operators of a business. Waste Management can be no exception
11 to that rule. An interim operating permit is no substitute
12 for a certificate of occupancy.

13 One thing that we know is clear from this Board
14 in previous decisions that you have made, and as Mr. Sockwell
15 so greatly alluded to, the standard of external effects
16 applies, so I'm not even going to go over that. And I don't
17 want to belabor that issue but only to say that if from kind
18 of what I'm getting a sense of today is the kinds of things
19 that should have occurred as a result of this application.
20 Waste Management chose not to apply for the variances they
21 were directing when they could have showed you all the
22 evidence that they are presenting today. And if you had made
23 the determination that they were entitled to this certificate
24 of occupancy, there would have been no more discussion about
25 this issue.

26 And we submit that at the end of the day you'll

1 make the decision that the zoning administrator was correct,
2 make them comply with the law, and if they were not entitled
3 to a C of O as a matter of right, as we say that they're not,
4 then they've got to comply -- in 1995, they've got comply with
5 existing regulations. And let's not put on blinders to
6 believe that 1995 trash transfer station isn't going to be a
7 hazard to the community when we know that it is.

8 So, I submit Waste Management kind of gave up
9 their right. They didn't apply for the variance, and,
10 therefore, you should deny their appeal here and send them on
11 their way. They have a special exception application pending,
12 and the hearing should be scheduled as soon as possible.
13 Thank you.

14 MR. HOOD: Madam Chairman, can I ask a question
15 or do you want me to wait until it's over?

16 CHAIRPERSON REID: No, go ahead.

17 MR. HOOD: Okay. I just want to ask you about
18 the interim permit. To your recollection, what was the
19 interim permits disseminated to the facilities for? What was
20 the reasoning behind that?

21 MS. RAY: The City Council issued legislation
22 in the form of the solid waste facilities permit at 1995 that
23 became effective -- it was passed in December of '95; it
24 became effective, if I'm not mistaken, May of '96. Pardon?
25 February, excuse me, of '96.

26 And that is the legislation -- there was --

1 prior to this, excuse me, there had been temporary and
2 emergency legislation issued or promulgated similar to this.
3 This was the permanent legislation, and this was the
4 legislation that required solid waste handling facilities now
5 to apply for interim operating permits pending these permanent
6 permits that would be coming out, and they were also told, as
7 a condition to this, that they needed to apply for new C of O
8 applications.

9 And in fact some of the arguments that Waste
10 Management is making refer to the '96 application and the '96
11 letter that references any C of Os applied for under the new
12 legislation. And in fact the Government doesn't deny the fact
13 that if the applications that they made in 1996 that directed
14 them to apply for C of O and then be denied and come to you
15 for a various or special exception are the valid applications.
16 That's fine.

17 1996 is when they were required to issue a C of
18 O application. They had long since dropped their claim on the
19 1995 application that they applied for November 21, '95 and
20 were denied 2-21-96 and got a letter in 5-22, over 90 days
21 which has been judged as a timely response for any appeals.
22 If they were deciding to make an appeal, they would have made
23 one before 5-22-96.

24 MR. HOOD: Thank you.

25 CHAIRPERSON REID: I've got a question, Ms.
26 Ray, along the same line. Did I understand you correctly to

1 say that the interim permit was no substitute for a C of O?

2 MS. RAY: That's correct.

3 CHAIRPERSON REID: All right. Then how is it
4 that they -- let me rephrase it. How is it that the granting
5 of the interim permit has allowed them to operate if that's
6 illegal? I'm confused about that.

7 MS. RAY: Excuse me. No, the granting -- they
8 were required to get these interim operating permits under
9 City Council legislation. As you know, in the District, we've
10 got a strange character here where we have maybe two
11 legislative tracks here where the City Council can issue
12 legislation that regulate businesses, but we also have the
13 Zoning Commission that can also promulgate legislation
14 regulations that apply to building -- excuse me, to
15 businesses.

16 And the fact that the City Council came along
17 and said, "Okay, we're trying to get in line and regulate --
18 or not regulate but still have some type of control over this
19 business," they can require that, but in addition, the Zoning
20 Commission and someone else can come along and say, "Yes,
21 that's licensing. We can do permits."

22 There are two separate tracks, and even though
23 DCRA is charged with enforcing or administering both, they are
24 not a substitute, and the fact that they've been allowed to
25 operate without having the C of O and only the interim
26 operating permit, there is really no excuse.

1 CHAIRPERSON REID: Well, let's say they have
2 been allowed -- well, if in fact they were in violation, why
3 weren't they closed down?

4 MS. RAY: Well, the Agency tried to with the
5 Mike Perkins C of O, when they tried to -- excuse me, when
6 they submitted a notice of revocation for the Mike Perkins C
7 of O, and this body revoked its C of O, and then they repealed
8 it. To every response that I'm told from the Agency to try to
9 take the C of O has been met with resistance on the part of
10 this business of Waste Management or Mike Perkins.

11 So, in effect, they should not be operating.
12 The fact that they are -- we agreed at the last hearing to
13 allow them to continue operating until the resolution of the
14 issue in this matter. But the fact is they do need to have a
15 C of O, and they've got various appeals pending for this body
16 on some later applications that should be heard as soon as
17 possible so we can bring them in line with the law.

18 But the fact is they should not be and how
19 they've been, really, I don't have a total answer for, but I
20 just submit that because there was a lot of issue and
21 problems, that we're still talking about a Mike Perkins C of O
22 that was revoked, kind of gives you an idea of why are we in
23 '98 still having a discussion over a C of O that you revoked
24 in 1995? I really can't answer that, but you need a C of O
25 and an interim operating permit in the District of Columbia to
26 operate a solid waste handling facility.

1 CHAIRPERSON REID: Well, if the City Council,
2 which is the ultimate authority in the city --

3 MS. RAY: Not for zoning.

4 CHAIRPERSON REID: Not for zoning?

5 MS. PRUITT-WILLIAMS: Zoning acts independently
6 --

7 CHAIRPERSON REID: No, no. Okay, no, no --

8 MS. PRUITT-WILLIAMS: -- and we promulgate our
9 own rules, and they cannot be overturned by City Council.

10 CHAIRPERSON REID: Well, let me rephrase that.
11 If they are the ultimate authority that promulgated the ruling
12 regarding the interim permits, I can't understand how it is
13 that they could promulgate a law that allowed certain
14 businesses to operate, and at the same time that law is
15 usurped by another authority so that the businesses are in a
16 catch-22 position where they have one authority that's saying
17 that it's permitted and then another authority saying that
18 it's not.

19 MS. RAY: That is a strange --

20 CHAIRPERSON REID: Is that the situation that
21 we're in here?

22 MS. RAY: Not totally. That's the strange
23 creature of the District, and that's back to the charter
24 provisions back during the formation, but that's not the same
25 thing here. It's just like saying if you wanted to operate a
26 business or building, you need a building permit, then you a

1 certificate of occupancy. It's just a separate licensing
2 scheme. The fact that you need more than one doesn't mean
3 that there's a catch-22. You know when you get ready to open
4 a business or if you go down, you've got to have this license,
5 and you need these things.

6 Now, the fact that the legislation or the
7 requirement for them were issued by different bodies does not
8 erase the fact that you are required to have a driver's
9 license as well as insurance or whatever. It doesn't erase
10 that fact.

11 So, I do agree that the District is a unique
12 creature, but the Zoning Commission is separate and distinct,
13 and these are two licensing schemes, and even Waste Management
14 admits in the letter that they got of May 22, '96 told them
15 "You need an interim operating permit," and also they were on
16 notice that "You also need to apply for a new certificate of
17 occupancy," because as they correctly assert, no other solid
18 waste handling facility had one in the District that said
19 that, because nobody was telling the truth.

20 People were finding languages to put on their
21 application that just got them by without a lot of review, and
22 they were told and put on notice that "We can't have this
23 anymore. We know you exist. You need to get a certificate of
24 occupancy with the correct language and as well as apply for
25 these operating permits that the City Council has mandated."

26 So, I don't think it's a catch-22. I just

1 think they're just separate licensing schemes, and it's a
2 requirement in the District, and it's a strange creature in
3 the District to have separate zoning authority or however you
4 want to put it.

5 CHAIRPERSON REID: All right.

6 MR. GILREATH: Madam Chair, I have a question
7 I'd like to ask.

8 Do you feel that the Waste Management firm
9 mislead the zoning administrator when they indicated what they
10 were going to use this for? To me, if I were working there, I
11 guess like this they'd say -- the question would be carting
12 and hauling, whether or not they're operational of that. But
13 the other is so straightforward, I don't see how the zoning
14 administrator could say they're being -- the were misled and
15 so forth.

16 MS. RAY: Well, I'm not totally -- excuse me,
17 but I'm not saying they were totally misled. What I am saying
18 is you cannot expect -- and there was some subterfuge going
19 on, and I need to address that too. On November 21, 1995, as
20 our documents have indicated, Waste Management submitted I
21 believe three certificate of occupancy applications, but only
22 two are the subject of this hearing. One of them was for the
23 reissuance of the Mike Perkins C of O that you had just
24 revoked.

25 In the use area, that indicated that the use
26 was the same. And it said that the use was light

1 manufacturing, warehousing, processing. Okay? On the same
2 day, they submit another application that says the use is
3 carting, hauling, processing of solid waste. You can't have
4 two different uses at the same facility, at the same space.
5 That automatically -- it was almost like well, we've started
6 calling the buckshot approach. Let's just shoot them through
7 and see which one will work.

8 And by its nature, a certificate of occupancy
9 is only required of the occupant of the building. So, there
10 was enough reason for the Agency to wonder, "Well, if we only
11 need one certificate of occupancy, why am I getting one for
12 two different applications for the same site when you only
13 need one to operate a business?"

14 And, secondly, I want to answer your other
15 question you mentioned that they couldn't have been clearer,
16 and, you know what? It's not that they were clear. The fact
17 that they're here saying they're entitled to the C of O, not
18 as a solid waste handling facility but as a carter and a
19 hauler.

20 And we're not saying that they were misleading
21 on that application. We're just saying you couldn't expect
22 the Agency to ignore the fact that it says "solid waste
23 handling facility" there and just issue it over a carter as a
24 matter of right, because the words that preceded said "carting
25 and hauling," and that the Agency was not expected to wonder,
26 "Oh, wait a minute. We have to look at what's being carted

1 and hauled." I mean, carting and hauling of nuclear waste?

2 If somebody submits a C of O application and
3 they wrote "carting and hauling processing," and then at the
4 end "nuclear waste," should the Agency just look at carting
5 and hauling, and say, "Okay, that's it, that's their matter of
6 right," or should they look further? And they did and said,
7 "You know what? This may involve some things that the BZA is
8 the more appropriate body to look at and determine," and we
9 just submit that that was correct.

10 And evidenced by the standard of external
11 effects that would be applicable even if they were just a
12 carter and hauler of something that was not noxious -- even if
13 they were just doing that, we still would need to look at the
14 standard of external effects which requires a more detailed
15 look at what the actual use it.

16 So, all we're saying is that the Agency and the
17 zoning administrator was correct by saying, "Flag, they're the
18 experts at this. If they're not looking out for our well
19 interests, somebody's got to that says, "Solid waste handling
20 facility? This needs some closer look," and that is all I'm
21 saying that happened.

22 But subterfuge, there might have been a little
23 just by the fact of the number of C of O applications that
24 were submitted. You don't need two; you only need one. Yet
25 on that day, as a matter of fact, there was three, but one was
26 for a different section of the building, and two, one for Mike

1 Perkins for one use and one for another use, that alone should
2 have brought us out.

3 MR. WILSON: Your Honor, you can't use that
4 description of what we've done as subterfuge, what's happened
5 with the --

6 CHAIRPERSON REID: Sustained, sustained.

7 MS. RAY: I was asked what would be misleading,
8 and I was just saying it could have been interpreted that way,
9 because we show two applications for the same address, same
10 location, and they both show two different uses.

11 MR. HOOD: Madam Chair, if I can just add. I'm
12 just looking here at the C of O, and we keep mentioning Mike
13 Perkins. On his C of O document that was in our submission
14 kits, he saying his proposed use was light manufacturing,
15 processing, fabrication warehouse steel products, office and
16 retail, I believe, construction, industrial supplies, and all
17 material non-hazardous.

18 My concern is we're dealing with the C of O of
19 Waste Management. Why are we entertaining Mike Perkins? And
20 maybe you can clarify that.

21 MS. RAY: That's part of what I was just
22 saying. Just the fact that they issued -- they asked for --
23 and you can apply, submit an application just for a name
24 change of a C of O -- an existing C of O, and that's what they
25 did. And I'm just we -- the Mike Perkins is dead. You
26 revoked it, because the use that you have there it was

1 determined later that there was a different use that was
2 actually being done.

3 The fact that we're talking about Mike Perkins,
4 I don't know why, because there's no C of O to discuss, and
5 the use that's on the Mike Perkins C of O is not the use that
6 Waste Management claims to want to use the property as.

7 So, I agree. I don't know why we're discussing
8 C of O for Mike Perkins, and we submit that's a mute issue.

9 MR. HOOD: Also, do we have an application of
10 certificate of occupancy that is dated 11-21-95 that's been
11 signed like this one here has been, because I haven't seen one
12 in my records? I don't know if any other commissioners have.
13 That is something that we need to obtain.

14 MS. RAY: I don't have it in my records, and I
15 think Waste Management indicated earlier that they would.

16 MR. HOOD: They would? Okay, because that is
17 real key, I believe. Thank you.

18 VICE CHAIR KING: Madam Chair?

19 CHAIRPERSON REID: Yes, do you have a question?

20 VICE CHAIR KING: Are we supposing that they --
21 or just hypothetically, there's no grandfather clause in the
22 Zoning Commission's rules and regulations for solid waste
23 trash transfer stations, is there?

24 MS. RAY: There's no specific -- as far as I
25 know, there's no specific provision for any type of business
26 for a grandfather clause. What it is appropriately called is

1 a non-conforming use, and it is, I believe, in the D.C. code,
2 and I don't know the cite the talks about a non-conforming use
3 protection.

4 In the Taylor case, which Waste Management has
5 kind of proffered as support for their claim, stood for the
6 proposition that a non-conforming use was granted, and it went
7 to the issue of whether there was an authorized, lawful use
8 prior to the change of the regulations.

9 And that's the key issue in this case, because
10 we don't have no lawful, authorized use prior to the change of
11 the regulations. We had a seeable application that was
12 denied, and if they had of come here and immediately had put
13 in for a variance, would have maybe still been under the
14 threshold.

15 But that's -- non-conforming use require -- it
16 says that if you have a lawful, authorized business prior to
17 the change, that it is inequitable, and it is unfair for us to
18 now say that your practice is illegal, but you need the
19 lawful, authorized use prior to the change to receive the non-
20 conforming use protection.

21 VICE CHAIR KING: Thank you.

22 CHAIRPERSON REID: Other questions?

23 MS. RAY: I thank you. My colleague will now
24 present our case.

25 MR. EUBANKS: Good afternoon. Again, I'm Musa
26 Eubanks with the Office of Corporate Counsel representing the

1 District of Columbia in this matter.

2 Before I -- I have three witnesses I'd like to
3 call, and before I call them, I'd just like to explain a
4 little bit about their testimony in light of the fact that
5 we're trying to narrow the scope of this hearing.

6 The witnesses are going to testify about the
7 noxiousness of solid waste facilities, this one in particular
8 and solid waste facilities in general. Waste Management was
9 allowed, through their representative, to testify about how
10 their facility operates. We think it's fair that we be
11 allowed to testify about the other side of the operation of
12 their facility so that this Board doesn't have the impression
13 that everything is rosy at 2160 Queens Chapel Road. And we
14 believe this is directly relevant to the zoning
15 administrator's determination and also in dealing with the
16 standard of external effects issue.

17 MR. WILSON: Excuse me. I wanted to object on
18 behalf of Waste Management. If the Government -- the
19 Government has not said before, but are they now saying that
20 the reason that our C of O application was denied in November
21 of 1995 is because of noxious odor of garbage? Because I
22 wanted to know -- what I'm asking is, following what the Board
23 has indicated to us, I just wanted to know what does that have
24 to do with the denial from November 21, 1995?

25 MR. EUBANKS: May I answer?

26 CHAIRPERSON REID: Yes.

1 MR. EUBANKS: In the zoning administrator's
2 decision, she points to title 11, DCMR 823, which lists
3 prohibited uses, and, again, I think, as we explained earlier,
4 it lists 12 or 13 uses. And at the end there's a portion that
5 says, "any other use with the characteristics similar to those
6 listed in the subsection." And through testimony and
7 evidence, we're going to prove that the solid waste transfer
8 facility is similar to the characteristics of some of these
9 prohibited uses.

10 CHAIRPERSON REID: You withdraw? Overruled.

11 MR. WILSON: No, Your Honor, I don't.

12 MR. EUBANKS: My co-counsel, Ms. Ray is handing
13 up copies of -- I'm sorry, my co-counsel is handing up copies
14 of all of our exhibits, and please let the record reflect it.
15 Waste Management and Venita's already been given copies of
16 these exhibits.

17 As I first witness, I'd like to call Ms.
18 Shirley Washington.

19 MR. WILSON: I just wanted to ask the Board
20 what the procedure is. I'm not certain that Ms. Washington
21 was listed on your witness list. Was she listed there, Mr.
22 Eubanks?

23 MR. EUBANKS: Actually, I do not believe Ms.
24 Washington was listed on our potential witness list. She does
25 work with DCRA, and we believe her testimony will be relevant
26 to the Board in this determination.

1 And, additionally -- I'm sorry, additionally,
2 there are no specific rules about sharing witnesses lists. We
3 just --

4 MS. PRUITT-WILLIAMS: Madam Chair, for
5 clarification, generally, it is not a -- as you stated
6 correct, there is no provisions or rules that require -- it's
7 just been habit that sometimes people have gotten used to
8 seeing people's names on witness lists. But it's been very
9 common that witnesses have been substituted for various people
10 on the list too.

11 MR. WILSON: Is this a substitute?

12 CHAIRPERSON REID: How many witnesses are
13 there?

14 MR. EUBANKS: Total?

15 CHAIRPERSON REID: Yes.

16 MR. EUBANKS: Three or four? I believe it's
17 five, I'm sorry. Five total.

18 CHAIRPERSON REID: Are the rest of them on the
19 witness list?

20 MR. EUBANKS: Yes.

21 MR. WILSON: The other three -- or the other
22 four are on the witness -- are there any on the witness list
23 that have been dropped?

24 MR. EUBANKS: Yes, there is.

25 MR. WILSON: Which is that?

26 CHAIRPERSON REID: Are you substituting --

1 VICE CHAIR KING: Madam Chair, as Ms. Pruitt-
2 Williams has said, I don't recall -- and I've been here for
3 over two years -- any argument about anybody who has something
4 substantive to add to our general knowledge being denied
5 because they weren't listed seven days in advance.

6 MS. RAY: Well, Venita Ray on behalf of the
7 Government. We submitted a list of potential witnesses to
8 Waste Management out of courtesy awhile back and as we became
9 aware of them. Some of these we've been made aware of in the
10 past couple of days, but we've made an attempt to do it, not
11 because of a rule but out of fairness, and because if we knew.

12 So, we submit Ms. Washington may not have been
13 on that list, but, again, we don't believe there was a rule
14 that spoke to it. We just did it.

15 MR. WILSON: If I could just -- one final
16 question. Was Ms. Washington involved with the November 21,
17 1995 decision?

18 MS. RAY: She was working with DCRA at the time
19 and investigated the site at the time.

20 MR. WILSON: So, she was involved in that
21 decision then?

22 MS. RAY: She was involved in investigating and
23 --

24 MR. BASTIDA: On the microphone so it's on the
25 record, please.

26 CHAIRPERSON REID: Ms. Ray, you need to come

1 forward.

2 MR. WILSON: Madam Chair, I'd like to voice
3 support for Ms. King's statement that any witness that has
4 something substantive to say that they should be accorded the
5 privilege.

6 MR. HOOD: I also concur, Madam Chair. I don't
7 think we need to prolong it; we just need to move forward.
8 Thank you.

9 MR. EUBANKS: Where should the witness sit?

10 CHAIRPERSON REID: Right in front of you.

11 MR. EUBANKS: Okay.

12 MS. PRUITT-WILLIAMS: Also, do you have those
13 in a form that can be submitted for the record?

14 MR. EUBANKS: Yes, we do.

15 May I proceed? I can move. Would you like me
16 to move? Ms. King, can you see this?

17 CHAIRPERSON REID: Mr. Wilson, rather than to
18 continue to object, you'll have an opportunity to cross
19 examine at that time, and I'd appreciate it if you'd hold your
20 questions until then.

21 MR. WILSON: Yes, ma'am.

22 CHAIRPERSON REID: Thank you.

23 MR. EUBANKS: I apologize for this delay.

24 WHEREUPON,

25 SHIRLEY WASHINGTON

26 was called as a witness by Counsel for the District of

1 Columbia and, having already been duly sworn, assumed the
2 witness stand, was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. EUBANKS:

5 Q Good morning, Ms. Washington.

6 A Good morning.

7 Q Can you please state your name for the record
8 and spell it?

9 A My name is Shirley Washington, S-H-I-R-L-E-Y,
10 Shirley, W-A-S-H-I-N-G-T-O-N, Washington.

11 Q What is your current occupation?

12 A I'm an investigator for the D.C. Department of
13 Consumer and Regulatory Affairs.

14 Q How long have you been in that position?

15 A I've been in that position since about 1983.

16 Q And how long have you been with DCRA?

17 A I've been with DCRA since -- no, I've been with
18 DCRA since about -- since it began. I figure when it began.

19 Q Okay. And what other capacities have you
20 served with DCRA?

21 A I was a paralegal for the D.C. Rental Housing
22 Commission, and I was there I think nine years. And I went
23 from there to working for the Investigations Division of the
24 Office of Compliance.

25 Q Okay. Can you give me a job description of
26 your current position?

1 A My job is to investigate regulatory complaints
2 -- presently, regulatory complaints and license complaints,
3 any violations of licensing laws. Anything that DCRA has
4 jurisdiction over, we're assigned to investigate when we get a
5 complaint or if we're directed to.

6 Q Have you ever testified in a case or hearing
7 before?

8 A Yes, I have.

9 Q Okay. Have you ever specifically appeared
10 before this Board?

11 A No, I haven't.

12 Q Okay. How many of the solid waste facilities
13 in the District have you visited?

14 A I've visited all of them, including those that
15 are closed.

16 Q How many total inspections would you say you've
17 made of solid waste facilities in your 16 years as an
18 investigator?

19 A Well, I've been assigned to work solid waste
20 since July '95, and since that time, maybe 2, 3, 400.

21 Q Okay. In your current position, have you ever
22 had occasion to visit the facility in question at 2160 Queens
23 Chapel Road, Northeast?

24 A Yes, I have.

25 Q How many times would you estimate that you've
26 been to that particular facility as an investigator?

1 A Since July '95, probably well over 100.

2 Q Okay. And why have you had occasion to go to

3 2160 Queens Chapel?

4 A Well, the Agency received complaints of odors,

5 truck noise, rats, insects from that particular facility --

6 and there was another one at the time -- but from that

7 particular facility, we had complaints there, and also because

8 we had received so many complaints, especially the truck

9 noise, the type of traffic, what the Office of the -- the

10 Chief of the Office of Compliance decided to do was to just

11 assign me solely just solid wasted facilities.

12 And, so once we got the complaints and I

13 started answering the complaints to go out, I'd also went -- I

14 got complaints from them too, from 2160. So, that's why I

15 went out. Initially, we had complaints, and then I was

16 assigned to work on solid waste.

17 Q Okay. What is the most recent complaint you've

18 received, do you know?

19 A I received a complaint last week.

20 Q About 2160?

21 A About 2160.

22 Q Okay. And what was that complaint for?

23 A Odor.

24 Q Okay. Are your complaints typically from

25 residents in that area?

26 A I've had complaints from the business community

1 and from the residents; the residents right in the area over
2 the bridge, yes.

3 Q Do you typically call before you visit the site
4 or is unannounced?

5 A No, I don't call. What I do is when I get to
6 the site, I always talk to the person who's in charge. In
7 that particular facility, it's Mr. Jesse Kemp. And I always
8 let him know that I'm there before I go, and I actually ask
9 him to sometimes stop even to let me in so that I can see
10 what's on the floor, what's happening there.

11 Q About how often would you say you receive
12 complaints regarding this facility?

13 A Maybe two, three a week.

14 Q Per week?

15 A Yes. Sometimes less, sometimes more.

16 Q To your knowledge, do they have deodorizers or
17 any equipment to combat the odors from the facility?

18 A They have a system. What they do is normally
19 when I get there, the system's not on, but when I come up they
20 turn the system on, and it's not effective; it's just not
21 effective. Depending on where you stand, you can smell that
22 facility. I've smelled 2160 as far away as Franklin Street.

23 Q And it also smells bad inside the facility?

24 A Oh, it's horrible on the inside. It's actually
25 raw garbage in there.

26 Q Okay. To your knowledge -- I'm sorry, as part

1 of the violations you write, do you ever write violations for
2 failure to have certificate of occupancy?

3 A Yes.

4 Q To your knowledge, does Waste Management or
5 anyone currently have a C of O to operate 2160?

6 A No one has -- to my knowledge, no one has a
7 certificate of occupancy for 2160.

8 Q As part of your duties, have you ever had an
9 occasion to take pictures inside or outside of 2160?

10 A Yes.

11 Q Okay.

12 A I normally take pictures when I go there.

13 Q If you could step with me up to the board so we
14 can look at the pictures.

15 MR. WILSON: May I follow them so I can see
16 what they're looking at?

17 BY MR. EUBANKS:

18 Q Do you recognize these photographs?

19 A Yes, I do.

20 Q What are these photographs of?

21 A These are pictures of the inside of 2160 that I
22 took.

23 Q Did you personally take all of these pictures?

24 A I took all of the pictures except this picture
25 at the top here, the area --

26 Q The aerial photograph?

1 A -- photo, yes.

2 Q And to the best of -- some of these pictures

3 have dates in the bottom corner. To the best of your

4 knowledge, are these dates accurate on these pictures?

5 A They're accurate, because my camera has a date

6 on them, so that's actually put on there by the camera.

7 Q Okay. And why did you take these photographs?

8 A As part of my inspection when I go there. I

9 usually take pictures. I normally take pictures, and I took

10 pictures to show what the facility looked like at the time I

11 was there.

12 Q If you could use this pointer and please

13 identify briefly what each picture is of.

14 CHAIRPERSON REID: Are you all speaking into

15 the mic?

16 THE WITNESS: yes.

17 CHAIRPERSON REID: Are you being picked up?

18 Okay.

19 THE WITNESS: This one also?

20 CHAIRPERSON REID: And, Ms. Washington, could

21 you also, because we can't read it, give us the dates of the

22 pictures.

23 THE WITNESS: Okay. The picture marked A-1 is

24 not the one I took, but this is an area shot -- an overhead

25 shot of the outside of 2160 Queens Chapel Road.

26 CHAIRPERSON REID: And a date?

1 THE WITNESS: This one is not dated. I didn't
2 take this one.

3 CHAIRPERSON REID: Okay.

4 THE WITNESS: Okay. A-2 is dated April 16,
5 1999, and that's a picture of the inside of the facility, and
6 what it shows is that the trash goes all the way up almost to
7 the ceiling of the -- actually, there's a window at the top,
8 but it goes all the way up to the top of the window inside the
9 facility, and that's very high. That's a tall facility.

10 BY MR. EUBANKS:

11 Q Keep going.

12 A Oh, these are raw chitterlings.

13 Q I'm sorry, what is it?

14 A A-3. This is a picture of raw chitterlings,
15 chitterlings.

16 Q And what are those?

17 A They're pig intestines. These are raw.

18 CHAIRPERSON REID: And where is this? This is
19 inside again?

20 THE WITNESS: Yes, this is inside 2160, and
21 it's marked A-3, and the date is 11-24-98.

22 This is a picture inside, and this is marked A-
23 4. This is October 29, 1997, and this is a picture of rat
24 droppings.

25 Again, this is a recent picture. This is A-5.
26 This is a picture of the floor. This actually shows the

1 condition of the floor. Now, this is the new tipping floor,
2 and it's just how it looks. And this is raw meat on the
3 floor.

4 A-6 is a picture of -- this is a hazardous
5 waste bucket.

6 CHAIRPERSON REID: What was that date, please?

7 THE WITNESS: The raw meat on the floor?

8 CHAIRPERSON REID: Yes.

9 THE WITNESS: August 17, 1999.

10 MR. WILSON: Madam Chair, might I ask, again,
11 we stipulate that we have trash on our tipping floor. That's
12 what this is.

13 CHAIRPERSON REID: Mr. Wilson --

14 MR. WILSON: It would be helpful to know what
15 time of day it is.

16 BY MR. EUBANKS:

17 Q Can you please give the time of day, if you
18 know, when you took these pictures with each picture?

19 A Well, I work between 8:15, 4:45, but some of
20 the pictures -- 8:15, 4:45, but I've been to the facility as
21 early as 5:00 in the morning, and I've been there -- actually
22 4:30 in the morning and as late as, say, 12:00 at night.

23 BY MR. HOOD:

24 Q May I ask, when you're there at 12:00 at night,
25 is the floor clean?

26 A At the time that I was there, no.

1 Q Would you say that --

2 A I've never -- the only time I've seen the floor
3 clean at 2160 is when they put the new tipping floor in, which
4 was about six weeks to two months ago, within the last two
5 months.

6 Q From your observation, it's not true that the
7 floor is clean within 120 minutes, I believe, which was
8 testified to earlier?

9 A Never.

10 Q Okay, thank you.

11 A Only time I've seen that is when the floor was
12 brand new and then -- and I mean brand new -- no, not at all.

13 This is a hazard -- A-6 is a picture of a
14 hazardous waste bucket. It's marked hazardous, and this is a
15 bucket that we saw June 1, 1999, and actually it's a medical
16 waste bucket.

17 BY MR. SOCKWELL:

18 Q I'm sorry, what's the date on that?

19 A June 1, 1998.

20 CHAIRPERSON REID: You said 1999.

21 THE WITNESS: I meant to say '98. But when we
22 were in the facility -- and this is a picture taken the same
23 day -- these are needles. This is infectious waste is what I
24 meant to say, infectious waste bucket.

25 What we saw when we went in is we saw the
26 medical waste, and we were very concerned, and so we took a

1 picture of it. So, these are needles here, and this the
2 medical waste bucket.

3 CHAIRPERSON REID: Okay, the medical waste
4 bucket.

5 THE WITNESS: Yes, it's marked.

6 CHAIRPERSON REID: Is the purpose of it to
7 accumulate hazardous waste?

8 THE WITNESS: No, they actually have to --

9 CHAIRPERSON REID: No, my question was is the
10 purpose of the hazardous waste bucket to contain hazardous
11 waste?

12 THE WITNESS: Not hazardous, medical I meant to
13 say. I'm sorry.

14 CHAIRPERSON REID: Okay, medical waste.

15 THE WITNESS: Yes, they're supposed to put
16 stuff in there. But, actually, in this type of facility these
17 things should -- this should not be in there. These needles
18 should not be in a solid waste facility like 2160.

19 CHAIRPERSON REID: Okay, no. My question was
20 the purpose of showing the bucket is for what?

21 THE WITNESS: Because I wanted to take a
22 picture of the fact that that bucket was there inside.

23 CHAIRPERSON REID: Well, is the bucket supposed
24 to be there?

25 THE WITNESS: No. The bucket's not supposed to
26 be there, and the needles are not supposed to be there.

1 CHAIRPERSON REID: Where were the needles?

2 THE WITNESS: The needles, I don't remember. I

3 don't really remember, because I really just took a picture

4 there.

5 CHAIRPERSON REID: Like on the floor or

6 something, outside the bucket?

7 THE WITNESS: They were -- I don't remember.

8 Here's another -- I think it was inside this box here. And it

9 stayed there awhile.

10 BY MR. WILSON:

11 MR. WILSON: Is that the box that says special

12 medical waste, that box?

13 CHAIRPERSON REID: What does the box say, Ms.

14 Washington?

15 THE WITNESS: It says "special medical waste,"

16 and you can see that symbols on here --

17 CHAIRPERSON REID: I see.

18 THE WITNESS: -- are very much the same. But

19 the point that -- what I wanted to point out is if you look at

20 the date here, it's June 1, 1998, and if you look here, it's

21 September 29, 1998. Separate days, and still, we still have

22 medical waste there. There should be no medical waste in that

23 particular facility.

24 CHAIRPERSON REID: And where were the needles?

25 THE WITNESS: I don't remember.

26 CHAIRPERSON REID: What date was that?

1 THE WITNESS: I can't even see my date here.
2 It's probably dated on the back. Okay, this is the June 1
3 date.
4 MR. WILSON: I'm sorry, but there's no apparent
5 date.
6 MR. EUBANKS: Yes, there is. You can come up
7 and see it.
8 THE WITNESS: Yes, it is. You can see it here.
9 In the background, if you look right here, you can see. See
10 here, 6-1, and it's probably also dated on the back, because I
11 usually date them on the back.
12 MR. BASTIDA: Madam Chairperson?
13 CHAIRPERSON REID: Yes?
14 MR. BASTIDA: As a matter of procedure, is Mr.
15 Wilson allowed to cross examine while she's presenting her
16 testimony or he should hold his questions until she's finished
17 her presentation?
18 CHAIRPERSON REID: No, you're right. Mr.
19 Wilson is supposed to hold his questions. However, at this
20 point, I'll allow him to ask, because it's very specific to
21 what they're talking about right there to get clarification.
22 BY MR. EUBANKS:
23 Q You can keep going through the pictures.
24 A Okay.
25 MR. BASTIDA: Well, Madam Chairperson, you
26 cannot have it both ways. So, either he asks for the

1 clarification after the testimony is presented or he can
2 interrupt every five minutes. I don't think that that's
3 beneficial to you or to the Government or to the Appellate,
4 because --

5 CHAIRPERSON REID: Mr. Bastida --

6 MR. BASTIDA: -- it takes too long to get
7 there.

8 CHAIRPERSON REID: Thank you, but I've already
9 ruled. Thank you.

10 THE WITNESS: Okay. So, A-9 -- where are we?
11 Oh, A-8 is again -- this is a box, special medical waste that
12 was inside the facility on 9-29-98.

13 This is A-9 -- did I call this A-8? Okay. A-9
14 is a picture of the drain system that they had. We actually
15 at some point had to insist that they clean out the drain,
16 because garbage was all inside the drain -- the drain system
17 that they had at that time. And that, again, that's dated 6-1
18 -- I think it's '98; I might have to look on the back. No, 6-
19 1-99, okay. We got it right. I got the date right. Yes, it
20 is. It's 6-1-99. Okay.

21 BY MR. EUBANKS:

22 Q I'm sorry. The picture appears to say 6-11-99,
23 but I'm not going to put words --

24 A Oh, 6-11-99, I'm sorry.

25 Q Can you read that as 6-11?

26 A Yes, 6-11-99.

1 Q Just in the interest of time, I'm only going to
2 ask you to look at a couple more pictures.

3 Can you please identify A-12, A15, and A-13 --
4 I'm sorry, A-12, 13, and 14?

5 A Okay. This one -- I don't know if you can tell
6 what this is either.

7 Q Well, just in the interest of time, can you
8 just start with 12?

9 A Okay. Twelve is a dead rat inside the
10 facility. A-12, that's 6-1-98. And 13, these are birds --
11 this is the tipping floor that they describe -- these are
12 birds and garbage, and you can see --

13 CHAIRPERSON REID: What number is that?

14 THE WITNESS: This is A-13.

15 CHAIRPERSON REID: A-13 is a --

16 THE WITNESS: Birds.

17 CHAIRPERSON REID: Dead bird?

18 THE WITNESS: No, they have a lot of birds that
19 come in and eat the garbage.

20 CHAIRPERSON REID: Oh, okay.

21 THE WITNESS: Scavenger birds.

22 BY MR. EUBANKS:

23 Q And A-14, I'm sorry.

24 A Okay, and the date on that, A-13, is 11-24-98.
25 And A-14 is -- these are insects. You can actually see the
26 roaches here. That's A-14, and the date is 9-29-98.

1 BY MR. EUBANKS:
2 Q You can return to the seat.
3 A Okay.
4 Q Now, Ms. Washington, most of those photos seem
5 to be 1997 and 1998. In your opinion, did the facility
6 essentially look that way back in 1995?
7 A I started working on this assignment in July of
8 1995, and that facility has always looked like that.
9 Q Okay. So, most of those pictures are what you
10 would have seen in 1995?
11 A Yes.
12 Q Okay. In the times you've been there, have you
13 ever seen the facility empty -- empty of refuge, I mean?
14 A The only time I've ever seen 2160 empty was
15 when they were putting the tipping floor in.
16 Q Okay.
17 A They actually stopped the operations there.
18 Q And have you seen live rats in there?
19 A Yes, I have.
20 Q And have you seen insects?
21 A Yes, I have.
22 Q Roaches?
23 A Yes, I have.
24 Q Birds?
25 A Yes.
26 Q Birds often?

1 A Yes, all the time.

2 Q Rat droppings?

3 A Yes.

4 Q Often?

5 A Yes.

6 Q Bird droppings?

7 A Yes.

8 Q Often?

9 A Yes.

10 MR. EUBANKS: I have no further questions for

11 this witness.

12 CHAIRPERSON REID: Thank you.

13 MR. WILSON: Do you save all cross examination

14 for the end?

15 CHAIRPERSON REID: Save it for the end.

16 MR. EUBANKS: As my next witness I'd like to

17 call Mr. J. Frank Bernheisel.

18 WHEREUPON,

19 J. FRANK BERNHEISEL

20 was called as a witness by Counsel for the District of

21 Columbia and, having already been duly sworn, assumed the

22 witness stand, was examined and testified as follows:

23 DIRECT EXAMINATION

24 BY MR. EUBANKS:

25 Q Good morning, Mr. Bernheisel.

26 A Good afternoon.

1 Q I guess it's afternoon, sorry. Can you please
2 state your name and spell your name for the record, please?

3 A My name is Frank Bernheisel, and that's spelled
4 B-E-R-N-H-E-I-S-E-L.

5 Q And what is your current occupation?

6 A I'm a vice president of Gershman, Brichner &
7 Bratton. We're solid waste consultants.

8 Q Okay. And how long have you been in that
9 position?

10 A Well, I'm not sure how long I've been a vice
11 president, but I've been with the firm since 1983.

12 Q Okay. And can you explain to me your job
13 description?

14 A My job description is to analyze solid waste
15 facilities or proposed facilities, and assist the -- our
16 client in either developing the facility or getting a permit
17 for the facility, doing a feasibility study for a facility,
18 supporting a financing for bonds that finance a facility,
19 doing environmental impact statements for facilities.

20 Q Can you please tell me about some of your prior
21 related jobs and any related in the solid waste industry?

22 A Well --

23 Q I'm sorry, I'm just going to interrupt for one
24 second. There is a copy of Mr. Bernheisel's resume. I
25 submitted that to the Board and also to Counsel several weeks
26 ago, so I'm not going to have him go on and on about his

1 qualifications.

2 If you could just give me maybe two or three of
3 your most recent positions?

4 A Well, a couple of transfer station-type
5 projects were to assist Culpeper County, Virginia to look at
6 options to their landfill, help them develop a procurement
7 document once it was decided that -- by their Board that the
8 landfill was not their best solution to solid waste
9 management, and then help them negotiate a contract with a
10 private firm to build a transfer station and transport their
11 solid waste to a larger landfill in Virginia.

12 I, way back in my history was a project leader
13 and engineering design team leader for a 750-ton-a-day waste
14 transfer and processing facility in New Orleans.

15 Q Okay. Can you tell me a little bit about your
16 educational background?

17 A Well, my educational background's a little
18 checkered. I've got some engineering, but my degree is a
19 bachelor's degree in mathematical statistics, and I have some
20 graduate work in statistics.

21 Q Okay. Are you currently certified in any solid
22 waste capacity?

23 A I have what's called a QEP, Qualified
24 Environmental Professional, and that's issued by a certifying
25 group in Pittsburgh, and in order to do that -- to get that,
26 you have to take a test, and it covers all of the

1 environmental media -- air, water, and solid waste, so it's
2 not just a narrow solid waste certification.

3 Q Okay. Do you teach any classes or give any
4 lectures regarding solid waste?

5 A I've taught several classes, but currently I'm
6 one of the instructors for the Solid Waste Association of
7 North America and just finished their collection course over
8 in Baltimore a month ago.

9 Q Okay. Can you tell us about your professional
10 memberships?

11 A Well, let's see, the --

12 CHAIRPERSON REID: Honestly, Mr. -- what's his
13 name?

14 MR. EUBANKS: Bernheisel.

15 CHAIRPERSON REID: Bernheisel. I think that we
16 get the gist of the qualification, and can we just kind of
17 proceed?

18 Thank you very much. We're very much -- we
19 have the resume, and we are very much apprised of Mr.
20 Bernheisel's?

21 THE WITNESS: Bernheisel.

22 CHAIRPERSON REID: Bernheisel's qualifications.
23 So, if you would proceed, please.

24 MR. EUBANKS: My intention was only to present
25 him to the Board as an expert in solid waste management.

26 BY MR. EUBANKS:

1 Q For your testimony today, have you reviewed any
2 books or publications?

3 A I went back and reviewed a number of state
4 regulatory packages for solid waste transfer stations focusing
5 on a couple things, including their choice of terminology just
6 to refresh myself. Also, there's a solid waste handbook
7 that's put out by Wiley. It has a section on transfer
8 stations. I reviewed that. And there is a state and local
9 solid waste management legal summary. I checked that.

10 Q Have you reviewed the pleadings in this case?

11 A Yes, I have.

12 Q Have you reviewed the relevant regulations?

13 A The District regulations?

14 Q Yes, the District regulations, yes.

15 A Yes, I have.

16 Q And have you reached a conclusion regarding the
17 zoning administrator's decision about the similarity between
18 solid waste facilities and the prohibited uses in DCMR section
19 823?

20 MR. WILSON: Objection. That's calling for a
21 legal conclusion, and I didn't know that he was a lawyer.

22 MR. EUBANKS: He's speaking specifically about
23 the characteristics that are similar between these two. This
24 is factual; this isn't legal.

25 CHAIRPERSON REID: Is it a legal -- I'm not
26 certain, excuse me. Is it a legal question here or is it

1 factual? Can he -- is he allowed to speak on that?

2 MS. SKIPPER: I think you can allow that to

3 come in, and if you thereafter deem it inappropriate, we can

4 handle it.

5 CHAIRPERSON REID: Scratch it, scratch it from

6 the record?

7 MS. SKIPPER: Yes.

8 CHAIRPERSON REID: Okay.

9 MR. WILSON: But he's being asked what he

10 thought of the zoning administrator's -- if he agrees with

11 that, having evaluated the appropriate regulations and

12 statutes.

13 MR. EUBANKS: I'm not asking him about the

14 legality of anything. I'm asking him about the similarity

15 between solid waste facilities and the prohibited uses.

16 CHAIRPERSON REID: I thought you were asking if

17 he agreed with the zoning administrator's analysis.

18 MR. EUBANKS: I'm sorry, let me change that.

19 CHAIRPERSON REID: Okay.

20 BY MR. EUBANKS:

21 Q Have you reached a conclusion in this case

22 regarding the similar characteristics of solid waste

23 facilities with the prohibited uses listed in Title 11 DCMR

24 section 823?

25 A Yes, I have.

26 Q And what is that conclusion?

1 A That for the facilities in the list that I have
2 personal experience with -- and I'm not an expert, for example
3 in steel mills or refineries, but I've visited both -- for
4 those facilities where I have personal experience, there are
5 specific similarities in the type of, I would call them,
6 environmental impacts that we're trying to control with solid
7 waste regulations.

8 They are dust and odor and potential water
9 pollution. The fact that the facility might handle -- not
10 necessarily always handle -- but might handle explosive or
11 flammable materials, so that, yes, there are similarities from
12 my personal experience with some of those uses.

13 Q Okay. In your preparation for this case, did
14 you have occasion to make a chart regarding the prohibited
15 uses and the similar characteristics?

16 A Yes, I did.

17 Q Okay. I'm going to hand you what's been marked
18 as Government's exhibit B-1.

19 MR. BASTIDA: Madam Chairperson, I think that
20 if Mr. Eubanks date the DCMR that he's referring to, it would
21 be beneficial, because in that way, he will make this --
22 assure the Board that in fact those were the prohibited uses
23 used by the zoning administrator at that time.

24 CHAIRPERSON REID: Okay.

25 MR. BASTIDA: You can look it up and then put
26 it into the record.

1 MR. EUBANKS: Okay.

2 MR. WILSON: Your Honor, I have the date if it
3 would be helpful.

4 CHAIRPERSON REID: Okay.

5 MR. WILSON: It's May 12, 1958.

6 MR. EUBANKS: May 12, 1958, I believe you said.

7 MR. WILSON: Yes, sir.

8 MR. BASTIDA: No, that cannot be it. The
9 Zoning Commissions were revised and keep on being revised, and
10 the last revision is 1996. So --

11 CHAIRPERSON REID: Okay.

12 MR. BASTIDA: -- I think that you need to look
13 -- research that and put it into the record.

14 CHAIRPERSON REID: Mr. Eubanks, if you will do
15 that?

16 MR. EUBANKS: Yes, we will.

17 CHAIRPERSON REID: We need to have the accurate
18 date.

19 MR. EUBANKS: Okay.

20 CHAIRPERSON REID: All right.

21 BY MR. EUBANKS:

22 Q I'm sorry. Do you recognize this document
23 that's been marked as Government's B-1?

24 A Yes, I do.

25 Q Is this the chart that you prepared?

26 A Yes, it is.

1 Q Okay. If you don't mind quickly stepping up to
2 the podium.

3 CHAIRPERSON REID: Use the microphone, please.

4 BY MR. EUBANKS:

5 Q If you could just briefly explain what you have
6 on this chart and each use, and if you could tell us your
7 experience with each of those uses you're referring to.

8 A Okay. With each of the uses, the ones that
9 have characteristics of solid waste facility beside them are
10 facilities that I've either been in or close enough that I
11 thought that I could list that as an experience.

12 Slaughter houses contain putrescible wastes,
13 which is any waste which will, in proper parlance, rot, and
14 that rot can be a carrier for disease. Harbor vectors, and
15 again we're talking about any organism -- birds, rats, et
16 cetera -- that can leave an odor. A settling gas, I've not
17 been to, ammunition manufacturer, no.

18 Animal rendering contains putrescible wastes
19 again. That's the cuttings from butchering and, again, can
20 harbor vectors and omit odors. We had one in Georgetown for
21 years that had a sign on the Washington Flower Mill, "The
22 odors don't originate here." Well, they came from the
23 rendering plant.

24 Arsenals can contain flammable or explosive
25 materials, and we do we see those in solid waste every once in
26 awhile. We try to avoid getting them in, but in my facility

1 in New Orleans we did get a case of shotgun shells in even
2 though we had screening, and so that would be the potential
3 danger.

4 Refineries, odors; can contain explosive and
5 flammable materials. Canning or storage of hides, very
6 similar to rendering, and fertilizer manufacturer, I don't
7 believe that I filled that one in. I've never been to a
8 fertilizer manufacturing plant. Rock quarries, very big dust
9 emitters, very high noise. And steel furnaces, again, very
10 high dust and pollution emitters, very high noise.

11 Q Thank you.

12 CHAIRPERSON REID: Now, let me see if I
13 understand this correctly.

14 The purpose of that presentation with this
15 chart is to show a relationship between the prohibited uses
16 under DCMR section 823 and how it relates to the waste
17 management facility or solid waste facilities in general?

18 THE WITNESS: Solid waste facilities in
19 general.

20 CHAIRPERSON REID: Okay. Now -- all right.
21 You're saying that a slaughterhouse has the same
22 characteristics of most solid waste facilities?

23 THE WITNESS: Let me just clarify. One of the
24 areas where I have been active is both on permitting and have
25 done some writing of regulations. The regulations that are in
26 place in most states -- and that's what I deal with most of

1 the time -- are designed to protect public health and safety
2 from the characteristics of solid waste.

3 Now, what I've listed up there are known and
4 recognized characteristics of solid waste that we try and
5 regulate against -- or to control in the business and then
6 compare those, at Mr. Eubanks' request, to the uses that I was
7 familiar with.

8 MR. WILSON: Your Honor, I must just state an
9 objection for the record.

10 CHAIRPERSON REID: Okay, may I finish?

11 MR. WILSON: Okay, go ahead and state your
12 objection.

13 MR. WILSON: I just wanted to state my
14 objection for the record. I don't believe the witness or the
15 Government is saying that we are the slaughterhouse or an
16 arsenal or whatever. And, as a consequence, discussion of
17 these sections is legally irrelevant. The regulation talks
18 about that which is specifically prohibited, and these uses
19 are specifically prohibited.

20 VICE CHAIR KING: But the final section says
21 "any other use with characteristics similar to those listed in
22 this subsection." This is the section that you yourself
23 quoted in your principal testimony at the beginning, and what
24 the Government witness is now doing is saying that your
25 operation falls under, O, any other use with characteristics
26 similar to those listed in this subsection. It seems to me

1 that it's perfectly permissible, Madam Chair.

2 MS. SKIPPER: I would just like to call to the
3 attention of the Appellant. He's misspoke. I believe you
4 said illegally rather than legally a few minutes ago when you
5 were referring to the various procedures. I think you meant
6 legally.

7 MR. BASTIDA: No, he refers to that he was
8 illegally testifying, because he was testifying to those uses,
9 and I thought that you had said that that was legal and
10 permissible to testify to those uses.

11 CHAIRPERSON REID: Okay.

12 MR. BASTIDA: Because of the similarity that --
13 you used the word "illegal;" that his testimony was illegal.
14 Or you referred to that.

15 MR. WILSON: I appreciate the point. The point
16 I'm making here is that the testimony is irrelevant.

17 CHAIRPERSON REID: Okay.

18 MR. WILSON: And that's all we are suggesting.

19 CHAIRPERSON REID: Okay. The problem I have
20 with this chart is they are specific prohibited uses that are
21 set forth within the regulations. Then in your matrix, you
22 then go on to set forth similar characteristics that are
23 proffered as being a basis for the solid waste facilities to I
24 guess -- correct me if I'm wrong -- but I guess you're saying
25 that these similar types of impact or types of circumstances
26 would then make the solid waste facilities, if they have any

1 of these characteristics, like a subset under the prohibited
2 uses?

3 For example, I can't follow where an arsenal --
4 it says that arsenal is prohibited. All right, we all know
5 what arsenal is. That's very clear in everyone's mind. But
6 then when you say characteristics can contain flammable or
7 explosive materials -- and my point of departure is if it was
8 the intent of the zoning regulation to set forth prohibited
9 uses, then I would thin that they would not stop with the
10 prohibited uses, they would also continue with these uses that
11 you said are the characteristics. I can't see how they could
12 all be put into the same box.

13 VICE CHAIR KING: You have to look at the
14 bottom, at letter "O."

15 CHAIRPERSON REID: No, no, that's a given.

16 VICE CHAIR KING: Under "O."

17 CHAIRPERSON REID: That's a given; "O" is a
18 given. But the argument that's being made here is that you
19 have prohibited uses, and then you have other uses of solid
20 waste facilities that can be construed as being prohibited.
21 And that's where I find this confusion. I think it's --

22 MR. EUBANKS: I'm sorry. I don't think I'm
23 exactly understanding the questions. The purpose of the chart
24 was to lay out the characteristics that are similar between
25 the solid waste facilities and the prohibited uses. The
26 zoning administrator, in her decision, used that portion "O,"

1 any -- well, I'm sorry, you can read it better than I can, I
2 guess, from here -- but uses with similar characteristics.
3 And this is to show that a lot of these have similar
4 characteristics to a solid waste facility to support the
5 zoning administrator's decision.

6 One thing I'd like to add is that in the zoning
7 administrator's decision, she didn't say a solid waste
8 facility is definitely like a slaughterhouse or like an
9 arsenal. She said "It's close. It's close enough, and I'm
10 not sure. I want you to go to the BZA for variance, and let
11 this Board make the determination as to whether those are
12 close enough."

13 CHAIRPERSON REID: Well, I still have a problem
14 with an arsenal and can contain flammable or explosive
15 material. Now, an arsenal is one thing, and gun shell is
16 another entirely. So, what we have here is a situation where
17 it's left up to the interpretation of whoever as to whether or
18 not these other things -- these other characteristics would
19 fall into the section "O."

20 MR. EUBANKS: And I think that was exactly the
21 zoning administrator's point; that these things are close
22 enough that Waste Management needs to come to this Board where
23 experts can be called and things like that to make a
24 determination as to whether the characteristics are similar
25 enough that it should be --

26 CHAIRPERSON REID: Whether or not we would

1 agree.

2 MR. EUBANKS: Yes, exactly.

3 CHAIRPERSON REID: Okay.

4 MR. EUBANKS: I just have a couple more
5 questions for Mr. Bernheisel.

6 BY MR. EUBANKS:

7 Q As part of your preparation -- I'm sorry, did
8 you mention that you had reviewed solid waste regulations
9 around the country?

10 A Several states.

11 Q Okay. And some type of glossary or some type
12 of solid waste manual that had a glossary?

13 A Both have glossaries. Most state regulations
14 have a glossary that applies so that the people applying and
15 the people approving the permits are all speaking the same
16 language.

17 Q In your 25 years experience dealing with solid
18 waste, are you familiar with the term "processing alone" being
19 used to describe what happens in a solid waste facility?

20 A Well, in -- if processing is applied to a solid
21 waste facility -- and some regulations are very specific on
22 this -- it implies things like shredding with a hammermill or
23 screening or other efforts to take solid waste apart, reduce
24 its volume, or break it into different fractions. Some
25 regulations are very specific; others are much more general.

26 When processing is applied to solid waste, my

1 first reaction would be something other than a transfer
2 station is taking place. Either we are going to pull some
3 material out for recycling; we are going to prepare a refuse-
4 derived fuel, or some other more extensive process than solid
5 waste transfer.

6 Q And are you familiar with the terms "carting"
7 or "hauling" being used typically in the solid waste industry?

8 A Well, carting and hauling are general terms for
9 transport. In the area around New York, which is very
10 particular, carting refers -- and carters in that very small
11 locality -- refer to people in the solid waste business.

12 But, in general, the term in the industry is
13 solid waste collection firm, and it's distinct from solid
14 waste transfer station. Sometimes we do use shorthand, but if
15 I'm a solid waste professional talking to another solid waste
16 professional and I'm talking about hauling, I know that we're
17 not talking about sand and gravel, because both of those are
18 solid waste people.

19 Q Okay. And are you familiar in D.C. that both a
20 permit and certificate of occupancy are required to run such a
21 facility?

22 A Yes, I am.

23 Q Is this unique to D.C.?

24 A No, it's not in my experience, and I've been in
25 D.C. quite a long time, and the problem in Government that
26 D.C. has is at both state and local government. In most of

1 the other states in the United States, what I see in the
2 regulations is the solid waste facility permits are granted by
3 the states, and the zoning required for those facilities is a
4 local function.

5 And most of the regulations, Maryland
6 specifically as one, require that before the permit's issued,
7 the local zoning has to be appropriate for whatever the local
8 zoning is for a solid waste facility.

9 Q Just a couple more questions. Sir, are you
10 being paid today as a consultant by the District of Columbia?

11 A I am a paid consultant, and I work for salary
12 for my firm. My firm gets paid for my services.

13 Q Okay. And has that -- the fact that you're
14 being paid, has that affected your outcome of your testimony
15 in any way today?

16 A No, it has not.

17 Q Thank you, sir. That's all I have.

18 MR. EUBANKS: If I could have the Board's
19 indulgence for one --

20 BY MR. GILREATH:

21 Q Mr. Bernheisel -- I hope I've got your name
22 correctly -- I agree that carting and hauling are general
23 terms for transport, but the way that this was stated on the
24 certificate of occupancy back in 1995, when you read that -- I
25 don't know whether you've had access to it or not -- but it
26 says -- are you familiar with the wording of that?

1 A Yes, I am.

2 Q Would that be unclear to you what was being
3 involved, the transporting and they say specific of this?
4 Would you have -- it would not be clear to you just what was
5 being involved in this?

6 I've heard the term -- they say carting and
7 hauling is not clear. In and of itself, as a general term,
8 standing alone, you don't know what to apply it to. But when
9 you have something specific, do you feel this is less than
10 clear? It would not reasonably understandable?

11 A Well, it wasn't really clear to me in reading
12 that until you get to solid waste. And as soon as they call
13 out that it's solid waste that's being brought in and taken
14 out, then the -- what comes up is solid waste transfer
15 station, which is not on that application at all. And that's
16 not a new term of art. It's been around for as long as I've
17 been in the business.

18 Q Well, I thought on the certificate of
19 occupancy, though, that they specify. They say specifically
20 solid waste handling facility for receipt, loading, compacting
21 and transfer, et cetera.

22 A Yes.

23 Q To my mind -- and I'm not -- I don't want to
24 put words in your mouth -- but once they add this clarifying
25 language, to me, it's hard for me to see how a reasonably
26 educated person could misconstrue what's being said here.

1 A Well, I tend to agree with you that when I got
2 to solid waste, my mind said, "Oh, yes, transfer station,
3 yes." But at the carting and hauling level, it could have
4 been furniture.

5 Q Well, that's true, but you'd have to take this
6 into account. The total import of this is to say it's
7 reasonably clear. Would you agree with that?

8 A I would say yes.

9 Q Okay, thank you.

10 MR. EUBANKS: My colleague is now going to come
11 up.

12 MS. RAY: Again, Venita Ray. I'd like to call
13 Edgar Nunley to testify as a witness, please.

14 Again, Mr. Nunley was here when the witnesses
15 were sworn in.

16 WHEREUPON,

17 EDGAR NUNLEY

18 was called as a witness by Counsel for the District of
19 Columbia and, having already been duly sworn, assumed the
20 witness stand, was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MS. RAY:

23 Q Mr. Nunley, can you I guess state your name and
24 spell it for the record, please?

25 A Yes. My name is Edgar T. Nunley. The first
26 name is Edgar -- that's E-D-G-A-R. Last name is Nunley, N-U-

1 N-L-E-Y.

2 Q And who is your employer?

3 A I work for the Department of Consumer and
4 Regulatory Affairs in the Zoning Division within the Building
5 and Land Regulation Administration.

6 Q And how long have you worked for, if I could,
7 DCRA?

8 A I've worked for DCRA for a little over 30
9 years.

10 Q And could you tell the Board what your current
11 position is?

12 A I'm currently Chief of the Zoning Review
13 Branch.

14 Q And what does Chief of the Zoning Review Branch
15 do?

16 A Well, my staff and I review applications for
17 building permits, certificates of occupancy, licenses. That's
18 our basic function. We do other things -- consulting with
19 consumers, et cetera.

20 Q And, briefly, can you just tell the Board what
21 other kind of positions you've held?

22 A I was a construction inspector for
23 approximately 15 years. I ran the -- I apologize -- I was
24 Chief of the Occupancy Branch for five or more years.

25 Q In your previous positions or current, are you
26 required to interpret or have knowledge of the D.C. laws and

1 regulations?

2 A Yes.

3 Q Which ones specifically do you deal with?

4 A Specifically, the DCMR 11, the zoning

5 regulations.

6 Q Okay. And, so you've worked with the

7 regulations for 15 to 16 years.

8 A Yes, in terms of interpreting them, yes.

9 Q Has your work ever involved issuing or approval

10 of a C of O application?

11 A Yes, my entire career, actually.

12 Q Can you explain briefly what you've done?

13 A Well, as an inspector, we would review

14 certificate of occupancy applications to make sure that they

15 were consistent with the building code. When I moved to the

16 Occupancy Branch, we would -- my staff would review the

17 applications for accuracy and correctness. And since I've

18 been Chief of the Zoning Review Branch, my staff and I review

19 applications for consistency with the applicable zoning

20 regulations.

21 Q And in November of 1995, what was your role in

22 processing C of O applications?

23 A My staff and I were in the position of

24 reviewing from the perspective of the zoning regulations.

25 Q And can you briefly explain what that process

26 is?

1 A Well, the applicant will -- the applicant puts
2 a narrative indicating what they propose to use -- a specific
3 piece of property or part of a property. They sit before our
4 staff. We look at the nature of the proposed use and make a
5 determination whether it was consistent with the zoning within
6 which the property was located.

7 Q So, briefly, can you just state what are the
8 factors that you use to make your determination at your stage
9 in the process?

10 A Again, we look at the use that the applicant
11 has placed on the certificate of occupancy application. We
12 try to match that up with a use that is specifically stated in
13 the zoning regulations. If it doesn't match specifically,
14 then we have consultation with the applicant to find out the
15 exact nature of the use. And then we make a determination
16 whether, based on the nature of the use, it's consistent with
17 that zone.

18 We then determine whether it is -- should be
19 approved over-the-counter; in other words, if it's just an
20 ownership change -- though I've heard them called name change,
21 but it's ownership change -- and no change in the previous
22 use, the process allows issuance over-the-counter without the
23 necessity for inspections.

24 If we determine, through the interview and the
25 narrative on the application, that there is some change in the
26 nature of the use, then we make a determination whether there

1 are any additional submissions required to give us more of an
2 idea of whether that use is consistent or whether inspections
3 are required to assure that the structure would meet the
4 building code as well as the zoning regulations, as is
5 dictated by the zoning regulations.

6 Q What do you do if a use does not meet the
7 zoning regulations?

8 A If it clearly does not meet the zoning
9 regulations, the application is denied, remanded to the main
10 office where a letter is prepared to allow the applicant to
11 seek relief from the Board of Zoning Adjustment, either
12 special exception or variance, as appropriate.

13 MS. RAY: That's all the questions I have.

14 CHAIRPERSON REID: Any questions for Mr.
15 Nunley?

16 BY MR. SOCKWELL:

17 Q Mr. Nunley, in the review of an applicant's
18 application for a certificate of occupancy, if you look at the
19 zoning ordinance and you see that the desired use includes and
20 exceeds the specific stated allowables, you said that -- well,
21 let's say -- what you said was that if doesn't meet what the
22 zoning ordinance states, you would confer with the applicant
23 and make a decision as to which way the application should be
24 sent.

25 In the case of the applications submitted on
26 the 21st of November of 1995, one of those applications did

1 specifically state what is in section 801.7, but, as well,
2 extended the description of use to things that are not
3 specifically located in the zoning code anywhere.

4 A That's correct.

5 Q And on the basis of the specificity of use
6 elements, would you say that such an application would
7 traditionally be submitted to the Board of Zoning Adjustment
8 as a non-conforming use to the specific requirements of the
9 zoning ordinance, to the extent that it could not be
10 adequately reviewed as an office or counter decision?

11 A I would say yes, but I would like to say this
12 also: I don't like to use the term "non-conforming use" in
13 this context, because it specifically -- it has a specific
14 meaning in zoning.

15 Q It does, it does, and I understand that.

16 A But in answer to your question, having said
17 that, the answer would be yes.

18 MR. SOCKWELL: Thank you.

19 CHAIRPERSON REID: Thank you.

20 MS. RAY: And the District calls its final
21 witness, Mitch Berger, please.

22 And I am not sure Mr. Berger was in the room
23 when the oath was given.

24 THE WITNESS: No, I wasn't.

25 CHAIRPERSON REID: Is there anyone here who's
26 come in who's not been sworn. If not, please stand.

1 WHEREUPON,

2 MITCHELL BERGER

3 was called as a witness by Counsel for the District of
4 Columbia and, having already been duly sworn, assumed the
5 witness stand, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MS. RAY:

8 Q Mr. Berger, can you state your name and spell
9 it for the record, please?

10 A My name is Mitchell Berger, two L's on
11 Mitchell, and Berger is B-E-R-G-E-R.

12 Q And can you tell the Board what your occupation
13 is?

14 A Well, currently, now, I'm not employed. I've
15 moved from the District of Columbia, but in most of the times
16 relevant to this case, I was an attorney at the Department of
17 Consumer and Regulatory Affairs here in the District of
18 Columbia from 1992 to April of 1999.

19 Q And as an attorney in the Office of Compliance,
20 what were your duties?

21 A Relevant to this case, in the spring of 1995, I
22 was assigned to work on solid waste facilities in both
23 regulating the facilities that were going to come under the
24 Solid Waste Facility Permit Act, drafting regulations, and
25 prosecuting violations issued to facilities under the zoning
26 and environmental statutes.

1 Q So, were you required to have a thorough
2 knowledge of the zoning regulations?

3 A Well, I had attained -- I want to be very
4 careful. I'm not saying I'm an expert in zoning, but prior to
5 that experience, I had worked in the civil infractions program
6 where, on a regular basis, we prosecuted citations for
7 operating without a certificate of occupancy.

8 And, so one of the few code books that I had in
9 my office that I personally bought was 11 DCMR. And we work
10 with that almost on a daily basis. So, by the time 1995 had
11 rolled around, I had worked with that volume for three years,
12 specifically in the area of certificates of occupancy.

13 Q And I think you just indicated that at some
14 point you were assigned solely to solid waste?

15 A Yes, in -- I don't remember the exact month,
16 but it was in the spring of 1995.

17 Q And do you have any specialized training in
18 solid waste facilities?

19 A My main training was more recent. I took a
20 two-day training and certification course offered by the Solid
21 Waste Association of North America in transfer station design
22 and operation.

23 Q Okay.

24 A And I have also visited a number of transfer
25 stations and have been given tours of transfer stations, both
26 in the District of Columbia, Virginia, and the state of

1 Nevada.

2 Q And more specific to this case, then, did your
3 work in the Office of Compliance ever involve trash transfer
4 station licensing issues?

5 A Oh, definitely, yes.

6 Q Can you describe that work for the Board,
7 please?

8 A Well, it was fairly wide compassing. We were
9 promulgating the regulations under the Solid Waste Facility
10 Permit Act. We were prosecuting facilities that never
11 bothered to apply for a solid waste facility permit or did not
12 have certificates of occupancy that allowed them to operate a
13 trash transfer station.

14 And investigating and learning as much as I
15 possibly could about transfer station regulation, this would
16 entail talking to regulators in other states, getting other
17 states' regulations and statutes, and comparing and using them
18 in developing our own regulations.

19 Q Based on your work in the Agency, and just to
20 establish, at the time that the applications at issue were
21 submitted to the Agency in November of 1995, during that time,
22 can you make a statement as to what the Agency's knowledge of
23 solid waste handling facilities were?

24 A What was the date again?

25 Q 1995.

26 A Well, when in 1995.

1 Q Okay. In November of 1995, the cat was out of
2 the bag, as it were for a good portion of the Agency in terms
3 of what this new creature, trash transfer or transfer
4 stations, was in the District of Columbia.

5 I would say until really the end of 1996 that
6 almost all of the relevant people would have known what the
7 term "transfer station" would have meant in a colloquial
8 sense.

9 In 1995, there were people within the Office of
10 Compliance, the legal office of the Department, not all of
11 them, who were familiar with transfer stations and some people
12 in the zoning area who were familiar with what transfer
13 stations were.

14 I obviously was familiar with what transfer
15 stations were, because I had been working on them at that
16 point for close to six months.

17 Q And can you describe for the Board what your
18 involvement in assisting the Agency and setting policy for the
19 handling of solid waste handling facilities?

20 A My role was largely that one of a fact gatherer
21 and of a legal researcher, as I said, looking at other state
22 and city regulations for solid waste facilities and comparing
23 those other regulatory schemes with what, for example, some of
24 the applications said in the District of Columbia, both solid
25 waste facility permit applications and what the C of O
26 applications said for some of the facilities

1 And helping to, for example, if there was a
2 meeting -- and at this point, I was on a lower level. I moved
3 up in the chain of command, if you will, later on. But at
4 this point in time, if there was a meeting with the head of
5 the Building and Land Regulation Administration and the Chief
6 of the Office of Compliance where I worked, the Chief of the
7 Office of Compliance might come out of that meeting and say,
8 "Okay, well, here's what we're going to do about the musical C
9 of O applications that we seem to be getting in where two and
10 three and four applications are coming in on the same
11 facility.

12 We want you to draft a memo. It's going to go
13 downstairs to the zoning counter, and if anyone comes in
14 making an application for a particular address, that
15 application is going to be routed directly to the head of the
16 Building and Land Regulation Administration, the zoning
17 administrator, and the Office of Compliance. So, it's not
18 even really going to be looked at or assessed by anyone at the
19 counter or the normal zoning review process.

20 We had a number of lawsuits going on. An
21 individual named Chavelle Jackson was in a legal dispute with
22 Mike Perkins who was the operator at 2160 Queens Chapel Road.
23 In one day, or in a space of one week, we had three different
24 applications come in for the address at 2160 Queens Chapel
25 Road. And by that time we already had the hold in process.

26 That helped us make sure that the District

1 wasn't issuing C of Os in error, or multiple certificates of
2 occupancy for the entire use of an entire building to
3 different parties. One of them was for the W. M. Basura
4 Group, and basura in Spanish means garbage. That one was
5 subsequently withdrawn.

6 Q And what address was that?

7 A That was for 2160 Queens Chapel Road.

8 Q And, so what did you look to as guidance for
9 the Agency's position of policy on issuing C of Os to solid
10 waste handling facilities?

11 A Well, as a lawyer, I looked to statutes,
12 regulations, and to legal decisions. In particular, the
13 zoning decisions by the Court of Appeals, but far more
14 importantly, and I think gets lost in some of this process,
15 particularly when such as in the case as the concerned
16 citizens of Kalorama and the Brentwood case where the Court of
17 Appeals upheld the decision by the BZA.

18 I thought it was extremely important to
19 actually read the text of the underlying BZA decision, because
20 as far as I was concerned, that was what the law was. Because
21 if the Court of Appeals upholds what the BZA says, then the
22 BZA decision is good law, and that's what we should be siding
23 to, because in both of those cases, the Court of Appeals dealt
24 with very narrow issues, while the BZA decisions dealt with
25 all of the issues involved in a case. So, I became familiar
26 with those cases.

1 Q And, as a result of your work with the cases --

2 A Oh, excuse me. And in addition, I read the,
3 for example, the promulgation of the regulations for recycling
4 facilities and the rationale for the promulgation of those
5 regulations issued by the Zoning Commission, and much the like
6 in other categories.

7 Q And, as a result of the work and the research
8 that you did, it wasn't the Agency's position that the solid
9 waste facilities were prohibited use.

10 A We concurred with the opinion of the zoning
11 administrator that if it wasn't a prohibited use, it was so
12 close to what a prohibited use, as described in the zoning
13 regulations, that this was something that needed as much as
14 the zoning administrator referred the Brentwood case where
15 someone wanted to operate a recycling facility, that this was
16 a call that had to be made by the BZA.

17 It was just too close, and obviously the
18 operations of these facilities would have such great impacts
19 that this was not a call that should be made by someone who is
20 subservient to or an agent of the BZA. It should be made by
21 the BZA, because that would have been a very substantial,
22 legal interpretation.

23 And the necessity for a public hearing on that
24 point was one of the main reasons why it was decided it should
25 go to the BZA. Because when the zoning administrator makes a
26 decision, there isn't a public hearing. When the BZA makes

1 one, there is.

2 Q Okay, well, you answered my other question.
3 So, can you briefly explain what happened, to the best of your
4 knowledge, when these C of O applications came in?

5 A Well, as I said, there was an administrative
6 hold, we called it, or a tripwire that when they came in the
7 door, because they had that address on it, 2160 Queens Chapel
8 Road, it was immediately routed to the zoning administrator,
9 the head of the Building and Land Regulation Administration,
10 and to the Office of Compliance.

11 And at that time, it was my job to call up and
12 have conversation with the submitters of those applications to
13 find out what the story was. And it does need a little back
14 history on that in that Waste Management has made it sound
15 like they willingly came forward and did this out of the
16 goodness of their hearts to be a good corporate citizen.

17 What they don't talk about is that in the
18 summer of 1995 DCRA uncovered that Waste Management had
19 already begun operating at the 2160 Queens Chapel Road
20 location, and we ascertained that, because Ms. Washington went
21 there and actually got the weigh tickets that were being
22 issued on the scales, and the weigh ticket said, "Waste
23 Management of Maryland, Inc."

24 So, as early as July or August of 1995, they
25 had already been operating in the District. They had been
26 contacted by us and told, "You're operating in the District."

1 You need a C of O." And, so it wasn't a forthcoming effort on
2 theirs. It was in response to a direction from us.

3 When those applications came in, as I said, by
4 that time, I believe I had established a relationship with
5 some of the attorneys representing the solid waste industry --
6 businesses in question, and remember at this site there was
7 the firm of Griffin, Berenson & Murphy, I think it was called
8 then, and I believe Beveridge and Diamond had come on board.
9 And we discussed these applications.

10 One of the applications, as I said, the W.M.
11 Basura Group was withdrawn. The other two applications were
12 handled by the letter issued by the zoning administrator
13 describing what it was that was -- what the decision was about
14 those applications. Later on in the -- in 1996 when the
15 additional application was made in response to the Solid Waste
16 Facility Permit Act applications, Waste Management was
17 extremely meticulous in protecting the rights of the Mike
18 Perkins certificate of occupancy, not the application but the
19 actual certificate of occupancy that had been issued and
20 revoked by the BZA.

21 I can state for a fact that the applications
22 made in November of 1995 when they weren't even discussed in
23 1996, they were considered to be dead letters. There was no
24 discussion whatsoever, "Look, we made one in 1995. Why can't
25 we let that one be it? Can't we just amend it to say solid
26 waste handling facility?" They were considered dead letters.

1 No one considered them to be active, viable, or in any way
2 anything that anyone wanted to pursue.

3 And the point of fact, not just my testimony,
4 when you look at the application that was made in 1996, it is
5 in detail talking about how this application does not in any
6 way attack the validity of the Mike Perkins certificate of
7 occupancy that was issued by this Board of Zoning Adjustment,
8 and so and so forth ad nauseam for pages and pages. There's
9 no mention of these November 1995 applications. There was no
10 intent that any rights that might have pertained or obtained
11 to those applications be preserved.

12 And as an operation of law, once Waste
13 Management comes in and makes a new application, since they
14 made those other two applications, that would tend to nullify
15 the prior applications anyway. And that's just common sense.
16 You make an application; the Government says it's denied; you
17 come in and make a new one, and you give the Government what
18 it wants.

19 That, to me, is the largest concession that
20 you're admitting that the other applications are null and
21 void. And there was no attempt not even a scintilla of trying
22 to preserve any rights under those applications.

23 Q So, in your -- I'm not sure -- you did explain
24 why the C of O applications were denied?

25 A As I said, the zoning administrator made the
26 determination, and this was in -- with the advice of the

1 Office of Compliance legal arm of the department that there
2 were two reasons why those applications had to be denied.

3 The Mike Perkins transfer of name, change of
4 business ownership, was simple. There was no C of O to
5 reissue. It would have caused massive confusion. This Board
6 revoked a C of O, and now we're going to treat it likes it's
7 valid, and the name can be transferred? That was absurd.

8 The second one, the reason was was that this is
9 so much like the prohibited uses that this is not something
10 that the zoning administrator can act upon; that it is
11 something that must be referred to the BZA for the BZA to make
12 that decision.

13 MS. RAY: We have no further questions. We'd
14 just like to indicate to the Board at this time, we'd like to
15 move our exhibits that we served copies of, A through I
16 believe it is E into the record and would submit that we have
17 concluded our case.

18 THE WITNESS: Do you have any questions?

19 CHAIRPERSON REID: I have one question. In
20 regard to these three applications --

21 THE WITNESS: Yes.

22 CHAIRPERSON REID: Do we know the dates of the
23 applications?

24 THE WITNESS: I believe they've been stated in
25 the record. They were made sometime in November of 1995.

26 CHAIRPERSON REID: All in the same month?

1 THE WITNESS: I believe so, yes.

2 CHAIRPERSON REID: And the same day?

3 THE WITNESS: Yes.

4 CHAIRPERSON REID: Oh, okay. All three the
5 same day.

6 THE WITNESS: The W.M. Basura Group might have
7 come in a little bit before or a little bit after, but it was
8 contemporaneous within a week or so.

9 CHAIRPERSON REID: The three applications that
10 were the subject of this hearing, you're right, they were all
11 on the same day, and Ms. King is correct, there is an exhibit
12 that just kind of briefly gives you an overview, because it's
13 kind of confusing. But they served on the Agency on the same
14 day, 11-21-95.

15 There have been other applications submitted to
16 which Mr. Berger is talking about in his experience with the
17 Agency, and he had received numerous applications over a
18 period of time.

19 THE WITNESS: There wasn't only just turmoil
20 within the Government about the solid waste facilities. There
21 was turmoil within the industry, and, as I stated before, Mr.
22 Chavelle Jackson, who was originally involved with the 2160
23 Queens Chapel Road locations, was involved with litigation
24 with Mike Perkins, and he was also involved at that point in
25 time I believe with another facility which has subsequently
26 closed on 1900 Kendall Street, the Olive Branch of Oxon Hill

1 location.

2 And we felt to a certain extent that the
3 District Government was being used as a vending machine. You
4 come in, you make the application, and you get the permit, and
5 then all of a sudden you start running around to courthouses
6 around the metropolitan area saying, "I have a certificate of
7 occupancy from the D.C. Government. I'm the rightful owner
8 and occupier of this business at this property. Give me a
9 court order kicking the other people out." We didn't want our
10 zoning process to be used to those ends. So, that was another
11 reason other than just trying to get a handle on the solid
12 waste business.

13 Our certificate of occupancy process was being
14 prostituted by some of the people in the solid waste business,
15 unwittingly and unknowingly, but it was being abused.

16 CHAIRPERSON REID: Any other questions?

17 BY MR. SOCKWELL:

18 Q Mr. Berger --

19 A Yes.

20 Q -- in your professional or experienced opinion,
21 if three separate certificate of occupancy applications
22 supported by filing fees were to appear at the District of
23 Columbia for the same lot, same square, and same square
24 footage, would you be able to act upon them effectively if all
25 three were for valid matter-of-right uses?

26 A If those applications each said -- and we've

1 had this situation before -- if the applications all say that
2 they're going to be used in the entire lot, or if one of the
3 applications says it's going to be using the entire lot and
4 one of the other ones says it's going to be using part of the
5 lot, well, we apply the law of physics to zoning. Only one
6 thing can occupy a space at the same time.

7 So, remember, these were jumped out of the
8 normal zoning process. These were immediately sent to the
9 zoning administrator. But assuming that they came in the
10 counter the same time, the same paralegal from the same law
11 firm's delivering all three applications at the same time, it
12 immediately would have been like what the heck's going on
13 here? Why would you be applying for three C of Os for the
14 same location at the same time? You can't do that. A flag
15 would have gone up in and of itself.

16 Q Regardless of the fact that the supporting
17 documentation from the attorney described in detail the
18 reasons that the District should accept all of them, the fact
19 that if they had been matter-of-right applications without any
20 potential question, there would not be a way that the District
21 could have awarded all three certificates of occupancy for the
22 same space at the same time. And they would have been self-
23 canceling, would they not?

24 A Could it have happened? Yes.

25 Q It could have happened?

26 A It could have happened. It would have been an

1 error if it had happened. I mean, I don't want to say the
2 Government doesn't make mistakes.

3 Q But the zoning ordinance in specific portions
4 under the certificate of occupancy speaks to change of use, et
5 cetera, change of name, change of ownership. You can't have
6 all of those things occupying the same space at the same time,
7 can you? I'm just asking.

8 A No, I agree with you. I just wanted to give
9 you the practical answer of, yes, mistakes happen, and it
10 could have issued.

11 Q But, legally, it would not have.

12 A But in terms of what my view of the zoning
13 regulations were, if it had been issued, it would have issued
14 an error. What happened by designed by the Agency that these
15 applications would be jumped out for immediate review at
16 higher levels would have happened anyway if someone came in
17 and said, "Here are two companies. They want to occupy the
18 same space at the same time even if they want to do the exact
19 same use."

20 You can't do it, because if you come to the
21 facility as the enforcer, and say, "Look, there's medical,
22 there's hazardous waste over here," and there's two
23 certificates of occupancy for the building, and occupant A is
24 saying, "Oh, it's occupant B," and occupant B is saying it's
25 occupant A, you've got a solid waste in the middle of the
26 facility and on one is saying who is responsible for it. But

1 you can't do it. You can't regulate zoning if you essentially
2 allow two people to use the same place at the same time.

3 Q But in the same -- if I approached the
4 certificate of occupancy branch with three applications on
5 three different days, each one extending a greater use to the
6 property, I could probably change my certificate of occupancy
7 on each of those three days to include additional elements of
8 use, legally.

9 A Not necessarily.

10 Q Not necessarily. Why not?

11 A Not necessarily, because it would depend on
12 whether the use was a lawful use that you --

13 Q That's what I'm saying. If it was a lawful use
14 --

15 A And if you're the same party -- I'm Joe Jones,
16 and I come in and I say one day I want to run an office. And
17 then someone comes and says, "You know, you've got a
18 storefront there. Maybe you can do a candy store there too."
19 And I come back the next day and say, "Hey, you know that
20 property I said I was going to do an office on, I also want to
21 do a candy store on it, and here's the specific square footage
22 on the property that I'm going to sue for the candy store."
23 Fine. If it's legal in that zone, it will be approved.

24 You come back the third day and said, "Gee
25 whiz, I can also use part of this place as a warehouse, and
26 it's a discrete section of the place that's not occupied by

1 the other two uses, yes, that could happen. But I can also
2 sell liquor in a store that originally sold groceries in the
3 same space.

4 Q Well, then you have a licensing issue.

5 A Yes, but the certificate of occupancy would be
6 valid for me doing that, if I achieved the other goals of
7 licensure.

8 Q I'm -- I have to --

9 A Because grocery stores traditionally do add
10 other functions. I'm just -- it's just --

11 Q Yes, they can add at other functions, but when
12 you start about A, B, C, I immediately say, "Oh," you know,
13 because --

14 A Yes, I know. I'm not trying to get in the
15 proximity of class A, B, and C licenses and all that.

16 Q Thank you, thank you.

17 BY MR. GILREATH:

18 Q Sir, I have one question.

19 A Certainly.

20 Q When you got three applications for a C of O
21 for the same property, would you interpret that to be simply a
22 matter of misjudgment on the part of the applicant or do you
23 see some other motive involved? Is there any particular
24 purpose of submitting three other than just simply they
25 weren't knowledgeable or didn't keep track of what they were
26 doing? What would be the purpose of getting three from the

1 same property?

2 A Well, given that these were submitted by I
3 believe in one case a paralegal working for a law firm that
4 we're aware of, and the law firm was reasonably well-versed in
5 the zoning laws in the District of Columbia, it would have
6 been an extremely charitable interpretation that this was
7 being done out of some unintentional ignorance especially when
8 you're confronted with an application that says the W.M.
9 Basura Group, and you know that basura means garbage in
10 Spanish, and that maybe they're not thinking that the -- so,
11 that -- because the issue was --

12 Remember back then, no one had used the word
13 "garbage," "solid waste" or anything like that on their
14 application, and we thought it was an excessive cuteness, if
15 you will, for someone to use the word "garbage" in Spanish so
16 that way they could later say, "Oh, well, we told the District
17 it was garbage; we just said it was garbage in Spanish.
18 They're just not culturally aware enough to know that."

19 So, when you're confronted with things like
20 that, it's hard to come to a conclusion that this was an
21 innocent error. Maybe in some cases it could be, but the fact
22 is there was already litigation going on, the players knew who
23 each other were. This was something that was tried to slip in
24 over the transom. That's what our view was. And that we
25 caught it.

26 Q So, the three applications, was that -- in your

1 judgment, was that to kind of confuse or smoke screen so that
2 one might slip through? What would be the purpose of them
3 submitting all three?

4 A Yes, you fire a shotgun. Maybe you don't hit
5 with all of it, but you hit with some of it. It was -- DCRA,
6 the D.C. Government -- when you're thinking back in 1995,
7 dysfunctional. The place was being held together by the hard
8 work and the dedication of the employees, but they were only
9 human.

10 Mistakes were made, because people were working
11 obscene hours, assuming responsibilities that in some cases
12 they hadn't been trained for, and in most cases had not been
13 paid for. And people knowledgeable in the District of
14 Columbia who dealt in land use and other business license and
15 regulations in the District of Columbia knew how dysfunctional
16 the Government was, and they took advantage of it.

17 BY MR. SOCKWELL:

18 Q Mr. Berger?

19 A Yes.

20 Q If I might say one thing. The fact that these
21 applications for certificates of occupancy on the November 22
22 date of '95 were submitted with a 10-page document of
23 supporting information -- okay, 12, including signature pages
24 -- a 12-page document, would in some jurisdictions create a
25 decision-making situation where the organization would look at
26 the documentation and react to it one way or the other.

1 In the District of Columbia, it has at least
2 been my experience that more than anything else it would
3 freeze the process.

4 A Well, you have to remember again -- and we had
5 set up an alarm system, if you will, that anyone comes in with
6 one of these addresses, send it to the zoning administrator
7 immediately. So, the fact that this statement was attached to
8 it to a certain extent is moot, because that's not what
9 triggered the review process.

10 The review process was triggered by we know or
11 we suspect that they're going to try to come in, because
12 essentially we had caught Waste Management with its pants down
13 operating unlawfully in the District of Columbia, that we knew
14 that they were going to try to come in one way or the other
15 and that they were going to come in with that address.

16 We didn't know how they were going to come in,
17 under what disguise they were going to come in, but that they
18 were going to come in, and the one thing that they would have
19 to have was that address on it.

20 So, the fact that there was a 10-page
21 statement, yes, in the course of things if someone on the
22 counter saw a 10-page statement with lawyers' signatures on
23 it, they would have gone to their supervisor. I don't think
24 they would have issued it over the counter unless someone
25 tried to intimidate them or pressure them to do that. And
26 that's been known to happen too.

1 MR. SOCKWELL: Okay, thank you.

2 CHAIRPERSON REID: Okay? Thank you, Ms. Ray.

3 That concludes your presentation?

4 MS. RAY: Yes, that does.

5 CHAIRPERSON REID: Thank you very much.

6 The next segment is for -- oh, I'm sorry, the

7 cross examination by Mr. Wilson.

8 MR. WILSON: May we take maybe a five-minute

9 break before we commence that.

10 CHAIRPERSON REID: Okay. Five-minute recess,

11 and then we'll commence with your segment.

12 (Whereupon, the foregoing matter went off the

13 record at 4:08 p.m. and went back on the record at 4:18 p.m.)

14 CHAIRPERSON REID: Perhaps the session will

15 reconvene.

16 Ms. Ray?

17 MS. RAY: Yes.

18 CHAIRPERSON REID: Do you have everyone here?

19 MS. RAY: Yes, except for Michael Johnson. I

20 think their associate just went to get him.

21 MR. HOOD: Madam Chair, we need to make them

22 cognizant of the fact that every time we come back they're not

23 here. So, we need to remind them of that when they have some

24 cross examining and everything else that goes along with the

25 process.

26 CHAIRPERSON REID: Right.

1 MR. HOOD: And I think that point, Madam Chair,
2 needs to be brought up when they come up.

3 CHAIRPERSON REID: Well, Mr. Hood --

4 MR. HOOD: Do you want me to bring it up?

5 CHAIRPERSON REID: I'm sure that you will be
6 happy to do that.

7 MR. HOOD: I sure will.

8 MR. GILREATH: He seems very qualified to do
9 that very thing.

10 (Laughter.)

11 CHAIRPERSON REID: Very qualified to do that,
12 most adequately.

13 MR. HOOD: Mr. Wilson, in all fairness to all
14 the rest of us who are here in attendance at this hearing, we
15 would appreciate it when we come back that the applicants
16 would be ready to resume when we're ready. Thank you.

17 MR. WILSON: Yes. I will do that; I apologize.

18 CHAIRPERSON REID: Okay. All right, now, Mr.
19 Wilson, I just want to do a time check, okay, because
20 hopefully we may be able to for once try to wrap this up this
21 afternoon so that we won't have to reschedule and come back.
22 Given that, how long do you think you would need for your
23 cross?

24 MR. WILSON: Well, I believe the cross
25 examination can be done for everyone in less than an hour, and
26 I'm hoping for a shorter period.

1 CHAIRPERSON REID: You think you need that much
2 time?
3 MR. WILSON: Yes, ma'am.
4 CHAIRPERSON REID: Do you think you can
5 expedite it to 30 or 40 minutes?
6 MR. SOCKWELL: You could talk really fast.
7 MR. WILSON: Yes, sir, Mr. Stockwell. I'll
8 tell you what I'll do. I will make -- I promise you, I will
9 make very effort.
10 CHAIRPERSON REID: Okay, okay.
11 MR. WILSON: When we put our direct case on,
12 even with a number of questions from the Board, we got through
13 it in an hour and 40 minutes.
14 CHAIRPERSON REID: Yes, you did very well with
15 that.
16 MR. WILSON: And I pledge we'll do the same, if
17 not better.
18 CHAIRPERSON REID: All right. And then we have
19 the intervenor's case, which -- how long do you think you'll
20 need?
21 MR. RALSTON: Fewer than two minutes.
22 CHAIRPERSON REID: Oh, really? Okay, very
23 well.
24 And then the rebuttal?
25 MR. WILSON: The rebuttal, at this point, we
26 may call one witness at this point, Your Honor.

1 CHAIRPERSON REID: So, approximately --

2 MR. WILSON: Yes, ma'am. We would expect to
3 take no more than 20 minutes on that rebuttal.

4 CHAIRPERSON REID: Rebuttal? Okay, all right.
5 Well, if we can keep those timelines, I think that we will do
6 very well, as much as possible.

7 MR. WILSON: I will also state that if there's
8 a short break for rebuttal, it helps us line up our
9 questioning so that we might present everything in an
10 expedited manner.

11 CHAIRPERSON REID: Okay.

12 MR. WILSON: I was asked by Mr. Eubanks if we
13 might take Ms. Washington first.

14 CHAIRPERSON REID: All right.

15 MR. WILSON: She has I think a child care
16 matter she wants to attend to.

17 Ms. Washington, could you come forward, please?
18 If I might, I'd like to sit this way, so I might get a good
19 look of your face, if I might, please.

20 CROSS EXAMINATION

21 BY MR. WILSON:

22 Q Now, Ms. Washington, you are an investigator,
23 is that right?

24 A Yes, sir.

25 Q And how many years have you been an
26 investigator, ma'am?

1 A Since 1983.

2 Q Now, isn't it true, Ms. Washington, that you
3 have no formal training in odor detection, is that right?

4 A No, I don't have any formal training.

5 Q And you don't have any academic training
6 related to odor detection. Is that right, ma'am?

7 CHAIRPERSON REID: Wait, Mr. Wilson. She
8 didn't testify that she had training in regard to odor
9 detection. So, it has to be -- you know that it has to be
10 germane to the testimony that we heard here today.

11 MR. WILSON: No, but she did talk about an odor
12 situation, and she's implied that there were odor problems
13 that were in violation, and so --

14 CHAIRPERSON REID: But she didn't say that she
15 had any special training. She didn't say that.

16 MR. WILSON: All right.

17 THE WITNESS: No, it just simply stinks, that's
18 all.

19 (Laughter.)

20 BY MR. WILSON:

21 Q And, again, you were talking about an odor
22 control system, is that right?

23 A No, they actually -- Waste Management actually
24 has a system, because I asked them to show me. They have some
25 pipes sticking out of the ground, and they have a wire that
26 loops to these pipes, and they have a barrel with some

1 deodorizer in it. What I'm saying that it's not sufficient to
2 cover the odor or to get rid of the odor at the facility or to
3 keep the odor from going out beyond the facility.

4 Q Okay. But it is true, is it not, that the
5 obligation is to maintain the odor within the zone in which
6 our facility is located, is that not correct?

7 A No, sir. I couldn't answer that question at
8 all. The reason why I got involved in the odor part of that
9 is because businesses and residents in the community called
10 our office complaining that -- of the awful smell, and I could
11 actually smell the facility myself before I got on your
12 property.

13 Q Okay. Do you know what our odor control
14 systems are called? Do you know what they're known as?

15 A No, sir.

16 Q So, you don't know anything about our negative
17 air pressure system?

18 A No. No, sir.

19 Q Are you -- you say you've been to the other
20 facilities in the District of Columbia. Is that right, ma'am?

21 A All of them; yes, sir.

22 Q And isn't it true that ours is the only one
23 with a negative air pressure system?

24 A I don't know what a negative air pressure
25 system is.

26 Q Okay. Do you know whether or not ours is the

1 only one with the akala system?

2 A I don't know what that system is.

3 Q Do you have any idea -- so, you don't know

4 whether or not Waste Management has expended over \$200,000 on

5 these odor control devices. Is the correct, ma'am?

6 A All I know is that Waste Management stinks.

7 MS. RAY: Excuse me.

8 BY MR. WILSON:

9 Q Okay. Let me ask you this --

10 MS. RAY: Excuse me. That's beyond --

11 BY MR. WILSON:

12 Q Let me ask you this --

13 MS. RAY: Didn't I just say excuse me?

14 CHAIRPERSON REID: She can object.

15 MS. RAY: Madam Chair?

16 CHAIRPERSON REID: Yes.

17 MS. RAY: I'd like to object. That is beyond

18 the scope of Ms. Washington's testimony. She testified to

19 going out and taking pictures, responding to complaints, and

20 smelling the odor. She never testified about systems --

21 CHAIRPERSON REID: Sustained.

22 MR. WILSON: No, she said it smelled.

23 THE WITNESS: It does smell.

24 CHAIRPERSON REID: Okay, sustained, sustained.

25 Her objection's sustained, so go on to the next question.

26 Thank you.

1 MR. WILSON: Yes, ma'am, I will.

2 BY MR. WILSON:

3 Q Now, approximately, how many times did you say

4 you get odor complaints each week?

5 A Two, three, maybe more, maybe less.

6 Q Can you --

7 A From Waste Management -- yes? Yes, sir?

8 Q And how many odor citations have you written up

9 on Waste Management?

10 A I don't write the odor citations, sir. The

11 only citation I've ever written on Waste Management is no C of

12 O.

13 Q Okay. And when did you do that?

14 A I don't have my documents here, but I did write

15 it.

16 Q Was that early 1998?

17 A I don't have the documents here.

18 Q Okay.

19 A But they were served.

20 Q And is there a reason why you did not write

21 them up sooner than that time?

22 A I would wrote them every single day.

23 Q You would written them up if they did not have

24 a C of O every single day. Why not? Why didn't you do it?

25 A I didn't.

26 Q You were given Waste Management a break?

1 A No, I think all of them are in violation with
2 the C of O thing, those that don't have a C of O. So, Waste
3 Management is not the only one by any means, but Waste
4 Management does not have a C of O.

5 Q But if you felt -- you're very conscientious
6 about your work, isn't that right?

7 A I do my job.

8 Q And you're concerned about doing it right,
9 isn't that correct?

10 A Yes, sir.

11 Q Okay. And, so my question is -- and I believe
12 you told us you've been out there 100 times.

13 A Maybe more, maybe less.

14 Q Maybe more, maybe less, between I believe you
15 said July 1995 to the present day. Isn't that right, ma'am?

16 A Yes.

17 Q And I believe you told this Board that you
18 didn't see any material change in the times that you visited.
19 Isn't that right?

20 A One time I told them that it was clean, once.

21 Q Once. What was that circumstance, ma'am?

22 A They were laying the new tipping floor.

23 Q Okay. Now, let me ask you this: Are you aware
24 of what the operating hours are of that facility?

25 A Yes, sir.

26 Q What are they, ma'am?

1 A They're on one of the pictures I think, but the
2 law says that they can open up -- I think they were allowed to
3 open as early as 6:00 and close as late as 6:00, maybe 7:00.

4 Q Actually, in fact, the law allows them to
5 operate until 10:00 p.m., isn't that right?

6 A I don't really know.

7 Q Okay. So, are you aware that it is their
8 practice that they clean the floor at least two hours after
9 they are no longer accepting solid waste at the facility on
10 the daily basis?

11 A That's not true, sir.

12 Q Okay. How do you know? Are you there every
13 day when they close?

14 A No, sir.

15 Q So, how do you know what the practice is?

16 A But I know they don't clean it every day,
17 because I've gone there in the morning, and there was still
18 garbage there.

19 Q No, no, no, ma'am. But you're not answering
20 the question. How can you know that there does not come a
21 point at closing every day when they clean that facility
22 unless you are there every day? You're speculating, isn't
23 that right?

24 A No, sir.

25 Q Well, how do you know that, if you're not there
26 every day?

1 A I have never been to Waste Management when the
2 floor was clean except the day they laid the new tipping
3 floor. I've never seen their floor clean except that one day.

4 Q Now, do you know whether or not the Waste
5 Management facility -- does it intentionally accept medical
6 waste or hazardous waste? Do you know that?

7 A I don't know what they intentionally do.

8 Q Okay.

9 A I know what I've seen there.

10 Q Okay. Do you know who -- but Waste Management
11 receives wastes that comes from its customers, isn't that
12 right?

13 A I don't know that. I've seen them actually --
14 I've seen Waste Management trucks. I've seen other trucks
15 that are not from Waste Management. I've seen both dump on
16 the floor there.

17 Q Fine. And they are supposed to dump on the
18 floor there, isn't that right? That's where they tip their
19 load, isn't that correct?

20 A They have no C of O to do it, but you're saying
21 is that what they do? That's what they do, but, no, they're
22 not supposed to do it. They're not supposed to be there.

23 Q They have an interim permit to do it, don't
24 they?

25 A They have an interim permit, yes.

26 Q Yes, ma'am. And the interim permit comes from

1 the District of Columbia, does it not?

2 A Yes, sir. They still have no C of O.

3 Q And an interim permit means what, as you

4 understand?

5 A That's a legal argument. I'm not an attorney,

6 sir.

7 Q No, I know you're not an attorney, but what do

8 you understand interim permit to mean?

9 A I know that they have permission to operate

10 there temporarily.

11 Q Okay. Now, let me ask you this: Isn't it true

12 that Waste Management has spotters that comb through the trash

13 to pick out medical waste and other waste that should not be

14 part of a load? Are you aware of that?

15 A I've never seen anyone sort anything in Waste

16 Management in the years that I've been going there, never.

17 Q Okay. Are you aware that Waste Management has

18 a program where they fine the businesses that they deal with

19 if inappropriate waste is traced to one of their loads?

20 A They've never told me that. I've never seen

21 that. I've only seen medical waste inside the facility. I've

22 never seen their program.

23 Q So, the answer is you're not aware of what

24 their program is, is that right?

25 A I've never seen it. No, they've never told me

26 about it.

1 Q Okay. Let me ask you this: Remember one of
2 the photographs that you showed us?

3 A Yes, sir.

4 Q And the photograph was a large box. May we see
5 the --

6 CHAIRPERSON REID: We know the photograph;
7 we're familiar with it.

8 MR. WILSON: Okay, it's a -- I didn't want to
9 misstate what the box --

10 CHAIRPERSON REID: Because we specifically
11 asked -- I asked about that particular photograph.

12 MR. WILSON: Actually, there were two of them.

13 CHAIRPERSON REID: I know. There was one that
14 was a bucket, and the other one was a box. And at the top of
15 it, it said "hazardous waste" or something.

16 THE WITNESS: It says "medical waste."

17 CHAIRPERSON REID: Medical, medical waste.

18 BY MR. WILSON:

19 Q And do you know why that box was there?

20 A No, sir.

21 Q Okay. So, you're not aware that Waste
22 Management, when it identifies medical waste inappropriately
23 included in loads at its site, will put it in boxes like that?

24 A Sir, that box was there for over three weeks.

25 MR. EUBANKS: Excuse me, Musa Eubanks for the
26 Government. I'm going to have to object. Mr. Wilson seems to

1 be asking Ms. Washington about a lot of policies and
2 procedures at Waste Management, which she's already that she
3 does not know -- is not aware of a lot of these policies. He
4 can save these arguments for his closing. Thank you.

5 MR. WILSON: No, no. It's not just procedures
6 that I'm asking.

7 CHAIRPERSON REID: Okay, overruled.

8 MR. SOCKWELL: Mr. Wilson --

9 CHAIRPERSON REID: What it is -- excuse me, Mr.
10 Sockwell -- what I'm hearing is a clarification on a exhibit
11 that was presented by Ms. Washington as to the purpose of the
12 picture of the box that she proffered. And I'm hearing that
13 being clarified, and that is the only thing that we will
14 allow.

15 Okay. Now, Mr. Sockwell?

16 MR. SOCKWELL: Mr. Wilson, I want you to be
17 aware that the Board realizes that the photographs of the
18 three items of medical and/or bio waste were shown as
19 independent items. They were not part of a pile of trash on
20 the tipping floor nor were they associated with anything else
21 that was within the plant. Therefore, we cannot assume
22 anything.

23 MR. WILSON: Thank you, Mr. Sockwell. I
24 appreciate your point.

25 BY MR. WILSON:

26 Q Now, what role, if any, Ms. Washington, did you

1 have with respect to the denial of the C of O application in
2 November 1995?

3 A None.

4 Q You did not participate in that decision in any
5 way?

6 CHAIRPERSON REID: She said none.

7 MR. EUBANKS: Objection. Asked and answered.

8 CHAIRPERSON REID: She said none.

9 MR. WILSON: I'm just asking for a
10 clarification.

11 CHAIRPERSON REID: But she -- no, none is
12 clear. So, go to the next question, please.

13 MR. WILSON: That's it. Thank you very much.

14 CHAIRPERSON REID: Next witness.

15 MR. WILSON: Next witness will be --

16 CHAIRPERSON REID: Thank you, Ms. Washington.

17 MR. WILSON: -- no, Mr. Johnson.

18 CROSS EXAMINATION

19 BY MR. WILSON:

20 Q Good afternoon, Mr. Johnson.

21 A Good afternoon.

22 Q Would you mind stating your name and title
23 again for the record, briefly?

24 A Yes, it's Michael D. Johnson, newly appointed
25 Zoning Administrator.

26 Q Okay. Mr. Johnson, were you in any way

1 involved in the decision that was made on November 21, 1995 to
2 deny Waste Management's C of O application?

3 A No, I was not.

4 MR. WILSON: I have no further questions of
5 you. Thank you very much.

6 THE WITNESS: Thank you.

7 CHAIRPERSON REID: Thank you, Mr. Johnson.

8 Next --

9 MR. WILSON: Next witness is Mr. -- let's see,
10 who else did they have? Okay, let's have Mr. Bernheisel,
11 please.

12 CROSS EXAMINATION

13 BY MR. WILSON:

14 Q Good afternoon, Mr. Bernheisel.

15 A Good afternoon.

16 Q Mr. Bernheisel, isn't it true that you've never
17 managed a solid waste transfer station?

18 A That is true. I've never managed a solid waste
19 transfer station.

20 Q Mr. Bernheisel, isn't it true that you've never
21 worked as an operator of a solid waste transfer station?

22 A That is also correct.

23 Q Okay. And, Mr. Bernheisel, I believe you
24 indicated that you have been involved with one or two transfer
25 stations? I know you mentioned the one in Culpeper, Virginia?

26 A No, I gave two examples. I think that I can

1 list at least ten transfer station projects, and as a
2 clarification of your earlier program, I have had oversight
3 over people who operate at transfer stations.

4 Q I believe you indicate that in your direct
5 testimony that you served as a consultant to the District of
6 Columbia Government, is that right?

7 A That's correct.

8 Q And you've done that over the years, you and
9 your firm?

10 A We have bid and won a number of jobs for the
11 District of Columbia, yes.

12 Q Okay. In fact, your firm wrote the solid waste
13 management plan for the District of Columbia. Is that not
14 correct?

15 A We wrote one of the draft solid waste
16 management plans for the District, none of which have been
17 adopted by the Council.

18 Q Okay. Isn't it also true that you actually
19 maintain an office or a workplace in the Department of Public
20 Works for the District of Columbia?

21 A I do not, no.

22 Q Is it true that your firm has done that, sir?

23 A My firm does not maintain an office or
24 workplace within the District of Columbia. My firm is a
25 subcontractor to another consulting firm that has been
26 provided an office, because their main office is in Oregon.

1 Q And, so your firm has served as a subcontractor
2 and a contractor to agencies of the District of Columbia for
3 how many years, sir?

4 A Well, off and on for ten.

5 Q Okay. And how much money has your firm
6 received in that representation over that ten-year period?

7 A I don't have the faintest idea.

8 Q Is it in excess of \$100,000?

9 A Probably, yes.

10 Q In excess of \$1 million?

11 MR. EUBANKS: Objection. Relevance.

12 BY MR. WILSON:

13 Q In excess of \$1 million?

14 CHAIRPERSON REID: He asked and answered the
15 question.

16 MR. WILSON: He answered that one. He said in
17 excess of 100.

18 BY MR. WILSON:

19 Q In excess of \$1 million?

20 MR. EUBANKS: I'm going to object again to the
21 relevance of this line of questioning.

22 THE WITNESS: I don't know.

23 CHAIRPERSON REID: Okay, sustained.

24 BY MR. WILSON:

25 Q What are the current contracts you're working
26 on now?

1 A I have two contracts that I'm working on -- one
2 of them as the subcontractor to a company called MDP,
3 management reform consultants, and we have two tasks that
4 we're working on under there to help reengineer the solid
5 waste administration and to upgrade the District's transfer
6 facilities to a state-of-the-art facility.

7 Q Okay, and what are the terms of your
8 subcontracts or contracts there in terms of the amount to be
9 paid?

10 MR. EUBANKS: Objection. Relevance again.

11 CHAIRPERSON REID: Okay, sustained. The amount
12 of compensation is deemed to be irrelevant. So, continue with
13 your line of questioning.

14 MR. WILSON: Okay, is the amount of
15 compensation he's received for whatever work he's doing today,
16 is that relevant?

17 CHAIRPERSON REID: No.

18 MR. WILSON: We can't ask him that?

19 CHAIRPERSON REID: No.

20 BY MR. WILSON:

21 Q Are you being paid for working today?

22 A I work for a salary --

23 CHAIRPERSON REID: That's already been
24 established. That was established within the testimony. Mr.
25 Eubanks asked him that at the end, remember?

26 MR. WILSON: Yes, ma'am, you are correct.

1 Okay, could we see the chart.

2 BY MR. WILSON:

3 Q If you could maybe stand -- approach this

4 easel?

5 Mr. Bernheisel, I think you explained that you

6 put this chart together, is that right?

7 A That's correct.

8 Q Forgive my ignorance, what's an abattoir?

9 A It's synonymous with slaughterhouse; it's a

10 French word.

11 Q Yes, sir. Have you been to a slaughterhouse

12 before?

13 A Yes.

14 Q Okay. And are you suggesting that -- what

15 slaughterhouses have you been to?

16 A Well, starting from open-air slaughterhouse

17 that a gentleman by the name of Guy Fry ran in Loudoun County

18 and slaughtered pigs that a friend of mine raised for my

19 family and a couple other families, and we all participated in

20 the dismemberment and wrapping of the meat and foiling of the

21 -- well, let's see, chitterlings is one thing and scrapple's

22 another.

23 Q I'm familiar with chitterlings and scrapple,

24 but my question is in terms of a commercial slaughterhouse,

25 have you been to one before?

26 A Yes, ones in the stockyards in Chicago years

1 ago.

2 Q You've been to those. Describe them, if you
3 would, for this Board, briefly.

4 A Well, in the terms of characteristics that are
5 similar to solid waste facilities, that's all I was testifying
6 on --

7 Q No, no. Answer my question, please. Describe
8 for the Board, if you would, just very briefly -- you've been
9 to slaughterhouses. Slaughterhouses of beef and pork?

10 A Well, beef, pork, lamb.

11 Q Okay. Describe very briefly the process, the
12 slaughtering of a beef steer.

13 A Well, it depends upon what the animal is.

14 Q The ones you've seen.

15 A Well, it still depends on what the animal is.
16 Animal comes in, and it's either shot or its banged in the
17 head to kill it, all right? It's usually done --

18 Q What do they bang it in the head with?

19 A Well, there are a couple of things. Sometimes
20 it's done manually in small facilities with sledgehammer, and
21 there's a special cartridge fire --

22 MS. RAY: I'm going to object right here. I'd
23 like for Counsel to establish the relevance. Mr. Bernheisel
24 was asked to testify as to the characteristics. To sit up
25 here now and for him to describe all these -- this process, I
26 think is beyond the scope and irrelevant to the issue at hand.

1 MR. WILSON: Well, he's told the Board it's
2 like a slaughterhouse. So --

3 MR. SOCKWELL: Mr. Wilson?

4 MR. WILSON: Yes, sir.

5 MR. SOCKWELL: Would you prefer that I, who
6 have no experience, explain it exactly the way you'd like to
7 hear it? The tools that are used and what happens, where the
8 animal goes, how it's skinned, how it's entrails are removed,
9 how those fall into either pits or a conveyor belt, how the
10 thing is gassed? I can tell you the whole thing.

11 CHAIRPERSON REID: I think --

12 MR. WILSON: Mr. Stockwell, I think you've very
13 ably described that.

14 BY MR. WILSON:

15 Q Let me ask you this --

16 CHAIRPERSON REID: I think, Mr. Wilson, that
17 I'll sustain the objection. I think that we all have an idea
18 as to the process that an animal goes through in a
19 slaughterhouse. So, that point is taken. So, can you just
20 move on with the cross examination?

21 MR. WILSON: Yes, ma'am, and I appreciate the
22 point, and I appreciate Mr. Sockwell's point.

23 BY MR. WILSON:

24 Q Putrescible wastes, again, educate me. What
25 are those, please?

26 A Well putrescible in singled out in solid waste

1 regulation, because it is defined as organic matter, which
2 will decay fairly rapidly, and in the decay process can
3 transmit diseases. It usually includes foodstuffs, human
4 waste, and other like type materials.

5 Q And that's described in our regulations,
6 putrescible waste is a phrase that you use in the D.C.'s
7 regulations?

8 A I don't believe it appears in D.C.'s
9 regulations. It appears in a lot of regulations around the
10 country, and it's of particular interest to managing solid
11 waste.

12 Q I'm really interested today in Washington D.C.
13 These foodstuffs that may be decaying --

14 A Yes.

15 Q -- give me an example of a type of foodstuff
16 that might decay at a -- well, we know what the examples are
17 --

18 A Well, one of the pictures that Ms. Williams
19 showed, she referred to as chitterlings, but I think is
20 unprocessed chitterlings is hog entrail, so that's an example.

21 Q Okay. Have you -- do you ever have at your
22 home -- do you or the person that you may live with ever
23 dispose of foodstuffs in your trash?

24 A Certainly, certainly.

25 Q Would you describe them as putrescible waste?

26 A Absolutely.

1 Q Okay. And those putrescible wastes are the
2 types of wastes that one might find in a garbage facility. Is
3 that not correct?

4 A I would be more definite than that. You will
5 find them in a garbage facility.

6 Q Okay.

7 A And that's why regulations tend to signal this
8 out, and we want to control solid waste management handling
9 because of the potential for disease.

10 Q Now, you would agree that your kitchen has
11 putrescible wastes from time to time, is that right?

12 A Always.

13 Q And restaurants that you frequent have it, is
14 that right?

15 A Absolutely.

16 Q Now, what are vectors, sir?

17 A Vectors are animals or other organisms that
18 carry diseases which will infect human beings.

19 Q Give me an example of what you're talking
20 about?

21 A A rat.

22 Q And so --

23 MR. EUBANKS: Objection. These questions have
24 been asked and answered already in direct examination.

25 VICE CHAIR KING: Absolutely.

26 MR. HOOD: And I concur, Madam Chair. His

1 personal kitchen has no relevance to what we are here for
2 today.

3 VICE CHAIR KING: His description of vectors
4 was given in his testimony in main. So, you might want to
5 move on, because you've got another what, half an hour for
6 your whole presentation.

7 BY MR. WILSON:

8 Q Thank you. Isn't it true that vectors and
9 waste and odors are found in any restaurant in any city?

10 A Certainly.

11 Q Aren't they found in any kitchen in any city?

12 VICE CHAIR KING: Vectors aren't necessarily
13 found in every kitchen.

14 MS. RAY: I would just ask the Board. What's
15 in the kitchen of Mr. Bernheisel has no relevance. He's
16 testified to characteristics found in solid waste handling
17 facilities or other similar prohibited uses and I think his
18 cross examination should be on that very issue.

19 MR. BASTIDA: Would you identify yourself for
20 the record.

21 MS. RAY: Venita Ray for the government.

22 MR. WILSON: But we think the cross examination
23 is on the issue -- Let me ask you this, you were talking about
24 matters under the regulations, not matters but operations that
25 are specifically prohibited. Is that not correct?

26 THE WITNESS: No, I was talking about

1 characteristics of different types of operations. We have 13
2 operations listed and I have a number of characteristics
3 listed.

4 BY MR. WILSON:

5 Q I agree with you. You were talking about
6 prohibited uses under the regulations. Isn't that correct? A
7 through N?

8 A Um-huh.

9 Q All right. Now, the point I'm trying to get
10 at with you is that a slaughterhouse really isn't the same as
11 a solid waste transfer station. Isn't that right?

12 A I did not say that it was the same as. I said
13 that it has characteristics which are the same or close to.

14 Q I'm not asking you what you said, I'm asking
15 you a different question now. I'm saying is a slaughterhouse
16 the same as a transfer station?

17 MS. RAY: But wait, excuse me. Venita Ray on
18 behalf of the government. He just told him what he'd
19 testified to. He didn't say they were the same. He said they
20 had similar characteristics and to the degree -- It has
21 similar characteristics. There's nothing in his direct
22 testimony that said they were the same.

23 CHAIRPERSON REID: Go on to the next question.

24 BY MR. WILSON:

25 Q Okay. What is an animal rendering facility?

26 A Well --

1 VICE CHAIR KING: Oh, please!

2 CHAIRPERSON REID: Ms. King, try to contain

3 yourself, please.

4 THE WITNESS: Ma'am, a rendering facility is a

5 facility that takes scraps of meat or animal fat, both cooked

6 and uncooked, and cooks them down in a double vessel, a steam

7 jacket in-between two vessels and boils it down so you get the

8 oils and grease out of the scraps that were in. It's usually

9 done under pressure.

10 MR. WILSON: Right. Isn't it true, sir, in

11 your view, that the types and the volume of putrescible waste

12 and vectors and odors one might find in a slaughterhouse or

13 the flammable and explosive material one might find in an

14 arsenal is huge in comparison to that which one typically

15 finds at a solid waste transfer facility.

16 THE WITNESS: If you're asking me if there's

17 quantity difference --

18 BY MR. WILSON:

19 Q In your experience?

20 A Yes. Absolutely.

21 Q Okay. Thank you very much.

22 CHAIRPERSON REID: Are you ready for the next

23 witness?

24 MR. WILSON: No, we're not just --

25 CHAIRPERSON REID: Okay.

26 MR. WILSON: No, we're not done yet. If I

1 could have one moment. I think the -- let me just check my
2 notes to make certain I don't have anything else Mr.
3 Bernheisel, I appreciate your patience. Oh, Mr. Bernheisel,
4 did you visit the solid waste transfer facility in question?

5 THE WITNESS: I have been by and around and
6 through the neighborhood several times. I have never been
7 inside the gate.

8 BY MR. WILSON:

9 Q Okay. So you've not inspected the facility.

10 A I have not inspected the facility from inside.
11 I've inspected it from the outside, yes.

12 Q Okay. Did you ever inspect that facility or
13 view it prior to the time Waste Management managed that
14 facility?

15 A I'm not sure. I visited all the solid waste
16 transfer stations within the District of Columbia, and quite a
17 few elsewhere. I've done it over past five years or so and
18 before -- particularly with the District facilities -- and I'm
19 not quite sure whether I was at the Queens Chapel Road before
20 Waste Management took over operation.

21 Q All right. And now I'll just ask you a
22 question to the best of your recollection, do you have a
23 recollection of how the Queens Chapel facility compares today
24 physically as it compared several years ago when you first saw
25 it?

26 A I guess I would recollect that I saw some

1 improvement when I was there this morning over what I saw four
2 or five years ago.

3 Q What are some of the improvements you saw, sir?

4 A Well less litter around the facility. The
5 first time I was here I'm not sure I remember any odor. I
6 could be more specific about some other facilities. But just
7 better general housekeeping.

8 Q Is that in your view as an expert in solid
9 waste, is that an important part of handling --

10 A Absolutely. The housekeeping is indicative of
11 management operations. Every solid waste facility that I go
12 into, if the housekeeping is poor I can usually find other
13 poor management practices that are going on within the plant.

14 Q Just one moment please, I think I only have one
15 or two more questions. Oh, were you present when the
16 testimony was given by Ms. Washington earlier?

17 A Yes, I was.

18 Q Okay. And she identified what she was a box
19 and I think a garbage can containing medical waste and she
20 also had a photograph showing syringes. Do you recall seeing
21 those?

22 A Yes. I --

23 MS. RAY: Excuse me, wait a minute. Wait a
24 minute, before you answer. Venita Ray on behalf of the
25 government. The basis of Mr. Bernheisel's testimony has never
26 been on his personal knowledge, he's been testifying to as an

1 expert characteristics, so to ask him to identify, he's
2 already said he hasn't been in the facility on personal
3 knowledge of what he saw, did he see it, is not relevant and
4 is beyond the scope.

5 MR. WILSON: That's not what I'm going to ask.
6 You're anticipating. I'm not going to ask.

7 MS. RAY: Okay, excuse me. I just want to make
8 sure we don't go there.

9 CHAIRPERSON REID: Let him ask the question
10 before you object, okay? All right.

11 MR. WILSON: Right. My question is is it true,
12 sir, in your experience in the solid waste transfer facilities
13 that you have visited and other solid waste facilities, that
14 from time to time customers include in the solid waste
15 inappropriate matter such as medical waste?

16 THE WITNESS: Yes.

17 MR. WILSON: Isn't it true from time to time
18 syringes --

19 MR. BASTIDA: Madam Chairperson, the question
20 of the appellant are not related to the testimony of the
21 witness. The witness testify to were there solid waste
22 regulations and there were similarities to solid waste
23 facility, or prohibited uses. I don't believe that this line
24 of questioning is appropriate. Thank you.

25 CHAIRPERSON REID: Okay, Mr. Bastida, this
26 witness testified as to his, he's an expert witness as to

1 waste management facilities and I would like to hear the
2 answer of the question that Mr. Wilson is asking.

3 MR. BASTIDA: Madam Chairperson, this witness
4 testified to the viability of point O, which says or similar
5 characteristics, and that's what his testimony as a waste
6 management expert address. You can give then the latitude of
7 the chair but the questions are beyond the scope of the
8 testimony.

9 CHAIRPERSON REID: Mr. Bastida, thank you very
10 much. Nonetheless, I've just stated that I'd like to hear the
11 answer to the question. Thank you.

12 THE WITNESS: Can we repeat the question?

13 MR. WILSON: Yes sir, and I might have some
14 difficulty recalling it. But I believe what I was trying to
15 ask you is that in your experience visiting solid waste
16 facilities and transfer stations across the country, from time
17 to time is it your experience that medical waste and syringes
18 and other inappropriate wastes from time to time can be
19 included in loads sent to a given facility?

20 THE WITNESS: Yes.

21 BY MR. WILSON:

22 Q Even when the manager or the owner of that
23 facility takes reasonable precautions to prevent it?

24 A Prohibited materials or inappropriate materials
25 do find their way into the waste stream and even with
26 inspection will pass through a facility. It's very hard to

1 find something small in a pile of, you know, 200 tons of
2 waste. It's needle in a haystack.

3 Q Just two final questions and I'm done. In your
4 experience, you've been involved nationally in solid waste
5 issues, isn't that correct? You and your firm?

6 A This is correct.

7 Q And in your experience are there any other
8 transfer stations in the District of Columbia that have a
9 negative air pressure system to deal with odor?

10 A Not to my knowledge.

11 Q Okay. And, again as you pointed out, you're an
12 expert on this area, there are hundreds, almost thousands of
13 transfer stations across the country. Is that not right, sir?

14 A This is correct.

15 Q And is it also not true sir that there are few,
16 if any, negative air pressure systems anywhere in the country?

17 A Well, negative air pressure is a technique
18 that's practiced on almost all the waste energy facilities.
19 They have the advantage that they have a natural disposal
20 mechanism for the air collected. It's not generally practiced
21 in transfer stations unless you're in a peculiar situation
22 because once you pull all the air in, which has odors and dust
23 in it, then you have to treat it in order to get rid of the
24 odors and dust, which it tends to be an expensive process.

25 Q Okay. And that's why most people refrain from
26 doing that?

1 A This is correct.

2 MS. SKIPPER: Madam chair --

3 MR. WILSON: Well I think we're done now unless

4 there's -- with this witness. Oh, I'm sorry.

5 CHAIRPERSON REID: I was just going to indicate

6 I didn't know whether he was going to continue further. This

7 was not an area that was brought up on direct and would not be

8 appropriate, should be stricken from the record.

9 MR. WILSON: Thank you, Mr. Bernheisel. We're

10 done with those questions.

11 CHAIRPERSON REID: Thank you.

12 MR. WILSON: The next witness is Mr. Nunley,

13 please.

14 CHAIRPERSON REID: Is this the last witness?

15 MR. WILSON: No, there's Mr. Berger. We're

16 only responding to their witnesses.

17 CHAIRPERSON REID: I see.

18 MR. WILSON: Let's see, give me one moment Mr.

19 Nunley, I have several questions for you.

20 WHEREUPON,

21 EDGAR NUNLEY

22 was called as a witness and, having been previously sworn,

23 testified as follows:

24 CROSS EXAMINATION

25 BY MR. WILSON:

26 Q Mr. Nunley, forgive me, but would you please

1 state your name, not your name but rather your position. in
2 November of 1995 at the time Waste Management submitted its
3 application, the application in question.

4 A I was chief of the zoning review branch.

5 Q Okay. Were you involved in the rejection of
6 that C of O application?

7 MS. RAY: Excuse me. Excuse me. Venita Ray on
8 behalf of the government. I asked Mr. Nunley, to my
9 recollection, no questions about the specific C of O
10 applications. I asked him about the process that he goes
11 through and that in his practice what is done and when they
12 see uses that are inconsistent what do they do? So any
13 questions that Mr. Wilson would ask, if he's asking
14 specifically about these applications, are beyond the scope of
15 my direct. I asked him about the process.

16 MR. WILSON: Your Honor, it seems to me we're
17 entitled to ask a witness if he -- I thought Ms. King at the
18 very beginning of the day told us all, appropriately, what
19 this was about and that was the basis. What is the basis for
20 the November 21, 1995 decision. And all I'm trying to ask of
21 this witness is whether or not he had anything to do with that
22 and if he had nothing to do with it there's no further
23 discussion about that issue.

24 MS. SKIPPER: Madam Chair, I think he's already
25 answered that particular question. Any other questions about
26 the particular instance are not appropriate because that was

1 not within the scope of the direct.

2 MR. WILSON: If I might ask counsel, I don't
3 recall what the answer to, you said he already answered my
4 question, I didn't recall what it was.

5 MS. SKIPPER: He said what he did, what his
6 position was.

7 MR. WILSON: No, no, my question was, I'm
8 sorry, ma'am, respectfully, all I was asking was what role, if
9 any, he had with respect to the November 21, 1995 application.
10 That was my question.

11 MS. SKIPPER: Okay, that is not something that
12 was brought up on direct and would not be an appropriate
13 matter for cross examination.

14 MS. RAY: There's another witness who spoke
15 specifically to the applications and how they were processing
16 and that would be the witness for Mr. Wilson to cross on the
17 specific applications and the processing.

18 MR. WILSON: But, Your Honor, it's interesting,
19 the government wants it extremely formal when we are asking
20 questions and they don't want it formal in other contexts.
21 All we're asking is that this gentleman, who works for the
22 District of Columbia government, to tell us whether or not he
23 had anything to do with the central inquiry of this case --
24 and that is our application. If he had nothing to do with it,
25 tell us. If he did, tell us.

26 CHAIRPERSON REID: His testimony, if I'm not

1 mistaken his testimony was basically on the procedures and
2 processes, when he gave his title today, the role that he's
3 employed in at DCRA today. Now the question as to whether he,
4 what his role was, if he had any involvement in this
5 particular case at the time the application was filed, you're
6 saying it's not relevant?

7 MS. SKIPPER: It's not relevant in that on
8 cross examination you're cross examining them on matters that
9 were opened up during the direct examination. That was not an
10 area that was opened up during the direct.

11 MR. WILSON: But I may add, my recollection,
12 and I would defer to Mr. Sockwell, is I had a recollection
13 that during Mr. Nunley's testimony that you did ask a question
14 related to the November 1995 application and Mr. Nunley's
15 role. If my recollection is incorrect I would defer to Mr.
16 Sockwell.

17 MR. SOCKWELL: My question was to the specifics
18 of applications that had multiple, were multiple applications
19 that might be filed. I did not ask him in the context that
20 those particular applications, well in a way I did. Let's put
21 it this way, it's reasonable to say that the question that I
22 raised was sufficient to allow you, in my belief, to ask the
23 question.

24 MR. WILSON: I appreciate that. I would await
25 the Board's decision.

26 CHAIRPERSON REID: All right. Then I'll

1 overrule the objection, please answer the question.

2 THE WITNESS: And would you please repeat it?

3 BY MR. WILSON:

4 Q Yes sir. If you would describe for the Board
5 what role, if any, you had with respect to the November 21,
6 1995 C of A application at issue here.

7 A None.

8 Q Okay. So you have no idea what process was
9 followed in that instance, is that right, sir?

10 A I can't speak to any direct knowledge, no.

11 Q Thank you very much. Let me see. I think we
12 should stop Mr. Nunley, thank you very much.

13 Ms. Reid, Mr. Mishkin is going to ask the
14 question to Mr. Berger and I think that should conclude our
15 cross examination.

16 CHAIRPERSON REID: Thank you.

17 WHEREUPON,

18 MITCHELL BERGER

19 was called as a witness and, having been previously sworn,
20 testified as follows:

21 CROSS EXAMINATION

22 BY MR. MISHKIN:

23 Q I will accommodate you although I'm not certain
24 that I'm doing you a favor in doing so. Good afternoon, Mr.
25 Berger. I'm Andrew Mishkin, representing Waste Management.
26 Mr. Berger, I believe that you testified that in the summer of

1 1995, the District of Columbia caught Waste Management with
2 its pants down with respect to the facility at 2160 Queens
3 Chapel Road. Are you aware that in the spring of 1995,
4 representatives of Waste Management met with the head of DCRA,
5 the City Administrator, and the head of the Department of
6 Public Works to indicate that Waste Management had taken over
7 the management of the facility at 2160 Queens Chapel Road and
8 that Waste Management wanted to come into compliance with the
9 District's regulatory program for solid waste management
10 facilities.

11 A No, I wasn't aware of that and the facts of the
12 case indicated that if that was the case, no C of O
13 application had been made and initially Waste Management
14 denied --

15 Q I'm sorry, Mr. Berger, I just asked you if you
16 if you were aware of a meeting --

17 A No, I was not aware.

18 Q That took in the place in the spring?

19 A I was not aware.

20 Q That's all I asked you, Mr. Berger, thank you.

21 A I was not aware of a meeting.

22 Q Okay. You also testified that the submittal of
23 three Certificate of Occupancy applications on the same day in
24 September of 1995 could have been intended to confuse or
25 mislead the District of Columbia. Isn't it a fact, Mr.
26 Berger, that you met in advance with the representative, the

1 attorney representing Waste Management with Certificate of
2 Occupancy application in August of 1995 prior to its submittal
3 and discussed the submittal of the application? And that you
4 further met with the attorney who submitted that application
5 and walked him through the submittal of the application?

6 MR. EUBANKS: Excuse me, I make an objection.
7 He just asked one question, it seems to me it's questions on
8 top of each other.

9 CHAIRPERSON REID: One question at a time,
10 please.

11 BY MR. MISHKIN:

12 Q I'm merely reciting Mr. Berger's testimony to
13 indicate the relevance of my question. The question is did
14 you not meet with the attorney for Waste Management who
15 submitted the Certificate of Occupancy in September of 1995,
16 prior to and during the submission of that Certificate of
17 Occupancy?

18 A I think learned counsel for Waste Management,
19 who was the attorney that I met with, is confusing the dates.
20 That was in 1996 or 1997 that we walked through the C of O
21 process and that was the Certificate of Occupancy that was
22 required to be obtained as a result of the Solid Waste
23 Facility Permit Act. The Certificates of Occupancy that we're
24 talking about here were the ones that were made in November of
25 1995. I think there's a confusion about the dates and the
26 times because definitely there was no walking through process,

1 specifically with the one from the W.M. Basura Group.

2 Q Mr. Berger, in fact with respect to the W.M.
3 Basura Group, is it your testimony that that certificate was
4 filed on behalf of Waste Management?

5 A That Certificate of Occupancy application was
6 filed by a group called the W.M. Basura Group, and I forget
7 the name of the individual who was listed as the Secretary of
8 the Corporation but it turned out to be a secretary who worked
9 at the firm of Griffin, Berenson, and Murphy.

10 Q And Mr. Berger, did Griffin, Berenson, and
11 Murphy represent Waste Management?

12 A No, but the appellation --

13 Q That was what my question was, thank you.

14 A Okay.

15 Q Thank you for answering my question, Mr.
16 Berger.

17 A Okay, all right, no but I'm trying to answer
18 your question fully and that is that --

19 Q Mr. Berger you've answered my question.

20 A No, I haven't answered your question.

21 Q I asked you if Griffin, Berenson, and Murphy
22 represented Waste Management.

23 A And what I want to say to you is that at a
24 certain point there was a substantial amount of confusion
25 about that. When we first went to the site, excuse me, I want
26 to answer the question. When we first went to the site, when

1 we found that Waste Management was operating --

2 MR. MISHKIN: Madam Chair, I asked a simple
3 question and the answer was no.

4 CHAIRPERSON REID: Did he answer?

5 MR. WILSON: He hasn't finished answering the
6 question.

7 CHAIRPERSON REID: Well allow him to complete
8 the answer, please.

9 THE WITNESS: When Waste Management was
10 originally discovered to be at the site by a DCRA
11 investigator, we were given the card and phone number of
12 Griffin and Berenson Murphy to contact. And there was
13 confusion, I don't know if it lasted until November, but there
14 was definite confusion over who represented Waste Management
15 at that facility. Initially, the firm of Griffin, Berenson,
16 and Murphy said that they represented Waste Management and if
17 I remember some of the earlier discussions that you and I had
18 was are you the representative of Waste Management or is it
19 Griffin, Berenson, and Murphy?

20 So if you're asking me to go back four years
21 ago and say to you to a certainty that I knew who was
22 representing Waste Management in November of 1995, I have to
23 say to you I don't know exactly when that issue was clarified.
24 I do know that initially we were instructed by the employees
25 of Waste Management to contact the firm of Griffin, Berenson,
26 and Murphy, that they were their attorneys.

1 MR. MISHKIN: What law firm provided the cover
2 letter for the November 1995 Certificate of Occupancy
3 application that was submitted by Waste Management?

4 THE WITNESS: I would have to see it, I don't
5 remember in particular what law firm's name was on the cover
6 letter. So independent memory I don't have. I assume it's
7 your former firm, Beveridge and Diamond.

8 BY MR. MISHKIN:

9 Q Okay. Do you recall the contents of the cover
10 letter that accompanied the Certificate of Occupancy
11 application?

12 A Not in particular. I would need to see it to
13 reflect my recollection -- to refresh my recollection.

14 Q Do you believe that there was any attempt in
15 that cover letter which accompanied the three Certificates of
16 Application in any way to hide the fact that it was
17 transmitting multiple Certificates of Occupancy applications?

18 A Well, that cover letter, I do not believe,
19 referred to or had anything to do with the application for the
20 W.M. Basura Group. I don't think that that came in at the
21 same, I don't think those three came in at the same time. I
22 think the two that came in with the Beveridge and Diamond
23 application were together and might have been referred to but
24 I don't think the third one was. The third one was something
25 that came in, I think, independently through the firm of
26 Griffin, Berenson, and Murphy. I don't think it was referred

1 to in that letter but I would need to see it to refresh my
2 recollection.

3 But the fact is that there were three
4 applications coming in on the same day, yes, would be an
5 indication that something was rotten in the state of Denmark,
6 because people who understand zoning law in the District of
7 Columbia don't make three applications for the same property
8 for the same use at the same time.

9 Q Isn't it a fact, Mr. Berger, that the three
10 applications, there were three applications submitted on
11 November 21, 1995. One was for a name change for the Perkins'
12 C of O, one was for a carting or a hauling terminal or yard
13 solid waste handling facility and the third one was for an
14 intermediate processing facility, and did not the cover letter
15 explain all three applications and why they were being
16 submitted at the same time? Have I refreshed your
17 recollection here?

18 A I would need to see the letter. You know, I
19 have great respect for you, as you know, but --

20 CHAIRPERSON REID: He says he doesn't remember.

21 BY MR. MISHKIN:

22 Q You indicated that as a result of concern about
23 certificates of occupancy that there was a, I believe you used
24 the word "tripwire" for transfer station certificate, or for
25 Certificate of Occupancy applications, that were submitted for
26 certain addresses. Could you explain which addresses were the

1 subject of this tripwire and how they were determined?

2 A As facilities opened some were added and some
3 were deleted as they were closed so my exact recollection in
4 November of 1995 what facilities are on that list is not
5 exact. But I'm going to say to you over the period of time
6 the addresses that were on that list: 1900 Kendall Street,
7 NE., 2160 Queens Chapel Road, 2155 Queens Chapel Road. I
8 believe 5201 Hays Street might have been on that list. The
9 address of 2115 Bryant Street might have been on that list and
10 1329 First Street, SE.

11 Q Is that the U line?

12 A No, the U line, that's the, that's in
13 Southeast, that's the ETW facility. The U line facility, I
14 don't remember if it was on that list in November of 1995. As
15 I said, we did have some new facilities attempt to open and
16 the addresses would be added to the list and as we closed some
17 down their addresses would be taken off. But I think that's
18 what might have been on there in November of 1995 when the
19 application came in.

20 Q Okay. So that that list was directed at
21 companies other than just Waste Management?

22 A Oh yes, definitely. It was keyed to the
23 addresses because as we said, this was a time of turmoil, we
24 had small operators like Mike Perkins reaching agreements with
25 large companies like Waste Management and we knew that the
26 Certificates of Occupancy were the key document in the play of

1 the transferring of the rights of these properties and we
2 wanted to be able to know who was coming in and who was going
3 to be a player in this market, and we also, as I said, wanted
4 to prevent the prostitution of the Certificate of Occupancy
5 application process by people who were trying to assert
6 property rights that they might not necessarily have had.

7 Q Okay. But you do recall that the November 21,
8 1995 Certificate of Occupancy application did specify that the
9 facility was going to be for a solid waste handling facility?

10 A Uh, I believe so but again I would, unless I
11 have the application in front of me I don't like to say what
12 it was that I knew at that time because it is four and a half
13 years ago.

14 Q Okay. We'll refresh your and the Board's
15 recollection on rebuttal. You testified I believe that the
16 decision about whether solid waste facilities were permissible
17 uses in a CM zone, I believe you testified that even if they
18 were not prohibited, that the question was so close that the
19 DCRA or BLRA should allow the Board of Zoning Adjustment to
20 make that decision. Was that not your testimony?

21 A Well I don't think I used the word allow. I
22 think we felt that, I mean there were some people who were
23 absolutely certain that it was a prohibited use and some
24 people who weren't so certain, but that it was so close a
25 call, I mean you had people on both sides of the line. The one
26 thing we could agree on was that if we couldn't agree within

1 the Agency, that this was something that the BZA had to do and
2 that there would have to be a public hearing -- which there
3 wouldn't be at DCRA.

4 Q Okay. So that it was not necessarily the view
5 of the agency that these facilities were clearly prohibited in
6 a CM zone, is that not a fair inference from what you've just
7 said?

8 A I think the letter from the zoning
9 administrator says it succinctly. States the position of the
10 Agency. And that's what I'd stand behind.

11 Q Where in the zoning regulations does it say
12 that uses that are too close to call must be referred to the
13 BZA?

14 A Well that, I think it's a reasonable
15 interpretation of O where it says similar uses with similar
16 objectionable or obnoxious characteristics and we could go
17 through --

18 Q Actually, are you referring to the section 800
19 that refers to 823, the list of uses prohibited in an M zone?
20 I'd like you to clarify that.

21 A In an M and a CM zone?

22 Q Right. The CM zone prohibits what's prohibited
23 specifically in an M zone?

24 A Yes. So it's prohibited in, if it's prohibited
25 in a CM zone and an M zone, it's prohibited, those kinds of
26 use are prohibited everywhere in the District.

1 Q Okay. It says those uses are prohibited.
2 Where in the regulations does it say but uses that are close
3 to those should be referred to the BZA?

4 A No, it says, O in the regulations says, with
5 similarly objectionable characteristics. Now, when you have a
6 phrase like similarly objectionable, that calls for
7 interpretation and the Agency felt that that interpretation,
8 since this was a very serious issue in the District of
9 Columbia, that that interpretation should be made by the BZA
10 and not the Agency.

11 Q So the Agency felt sufficiently uncertain that
12 these facilities were similar to the listed uses that it
13 deferred a decision on that?

14 A No. No, I wouldn't say sufficiently uncertain.
15 I would say we felt sufficiently certain that they were
16 similarly objectionable but that that call had to be made by
17 the BZA. This was a decision not so much on the substance but
18 the procedure. When you have what would have been, as far as
19 we could tell, a case of first impression and interpreting
20 what O meant in terms of the District of Columbia, that that
21 should be something that's interpreted by the BZA rather than
22 the Zoning Administrator.

23 CHAIRPERSON REID: Okay, do you have any more
24 questions? We're at the hour mark now. And the last question
25 was repetitive because he answered that question three times.

26 MR. MISHKIN: I have a few more questions and

1 they are on a new subject and I will try to keep them as
2 unrepetitive as possible. Okay?

3 BY MR. MISHKIN:

4 Q Mr. Berger, do you recall whether in 1996 and
5 1997 that DCRA instructed Waste Management to file a request
6 for special exception for a solid waste handling facility with
7 the BZA under regulations that were proposed but not yet
8 finalized?

9 A Um, that wasn't the reason why we asked them to
10 do that, but yes, we did ask them to do that. It was on
11 instructions from the BZA that we did rather than from an
12 agency decision?

13 Q It was instructions from the BZA?

14 A The Zoning Administrator was in contact with
15 the BZA, the Zoning Administrator was advised that the
16 variance process was not the way to go, that the special
17 exception process was the way to go. And that's why the
18 Zoning Administrator changed the requirements. It was only
19 upon instruction from the BZA, or counsel for the BZA I'm not
20 sure, I wasn't privy to that conversation, that that
21 requirement was changed. This was not a decision made at the
22 DCRA level.

23 Q Okay. But isn't it a fact that on July 7, 1997
24 when Waste Management submitted its application for a special
25 exception to the BZA that the Office of Zoning refused to
26 accept that filing because the regulations under which the

1 special exception was sought were proposed?

2 A That's my understanding of why they did it,
3 yes.

4 Q Okay. So they instructed Waste Management to
5 go to the BZA but when Waste Management went to the BZA they
6 refused to accept Waste Management's tendered filing?

7 A And as a result of this confusion DCRA, as you
8 know, agreed -- as you pointed out -- that because there was
9 this confusion we would not put any penalty on Waste
10 Management until the government had its act together on that
11 point. And we took no action in that regard.

12 MS. RAY: Venita Ray on behalf of the
13 government. We're talking about 1996 and 1997 and even though
14 I understand that what was going on around that time was
15 relevant, it just really has extended the scope of this and
16 maybe if we could talk about what the Agency did in making
17 their decision in 1995 and early 1996, it kind of would
18 expedite this process.

19 CHAIRPERSON REID: Ms. Ray, for my edification
20 in that this is really convoluted and is very complicated and
21 as he was mentioning, the BZA having the, that the ZA had
22 contacts, the BZA had been instructed and I think I was here
23 at that time, I don't have a recollection of that necessarily.
24 Nonetheless, it appears to me that it is establishing more
25 data for us to be able to make our decision so therefore I
26 will overrule that objection. Thank you.

1 MR. MISHKIN: Thank you. This is also relevant
2 to the question of Waste Management sat on its rights with
3 respect to the 1995 application. There has been a motion to
4 dismiss filed by Corporation Counsel. And I've only got two
5 or three more questions.

6 BY MR. MISHKIN:

7 Q Mr. Berger, you just stated that you indicated
8 that as a result of the rejection on July 7, 1997, DCRA
9 indicated to Waste Management that Waste Management would not
10 be penalized and I believe you used the words until the
11 government got its act together, that Waste Management would
12 not be required to proceed further with respect to a
13 Certificate of Occupancy. Is that not correct?

14 A That's correct.

15 Q Okay. Do you know whether the government ever
16 issued written instructions to Waste Management with respect
17 to the filing of a new Certificate of Occupancy?

18 A We didn't think they were necessary. Once the
19 Zoning Commission's rules became final it became very clear
20 what Waste Management was required to do.

21 Q So your answer is that the government did not
22 do that?

23 A No, the government did give written
24 instructions to Waste Management what to do. It was published
25 in the D.C. Register and they were the rules and regulations
26 for applying for a solid waste facility Certificate of

1 Occupancy. That's how the government communicates things to
2 people. There was no question in Waste Management's minds,
3 our doors was always open. Do we have to follow the zoning
4 regulations that had been promulgated? The answer would have
5 been yes. Can we have some time to do it? How much time do
6 you need? If it was a reasonable amount of time it would have
7 been given. But once those regulations were published and
8 final, it was clear to everyone in the District of Columbia
9 what obligation of anyone who was operating a solid waste
10 facility had to do.

11 Q But you did testify that it is true in the
12 summer of 1997 that you did indicate to Waste Management that
13 you would issue Waste Management written instructions and that
14 you would allow them a reasonable time to respond?

15 A No, no we didn't. No. No. I don't think that
16 we indicated that we would send written instructions to Waste
17 Management. I don't think that that was indicated. As you
18 pointed out, the letter that Waste Management sent was never
19 responded to by the government. It was a letter sent to make
20 a record and it was accepted as such, but I don't believe a
21 letter in response was given that made any promise of any
22 assurance that you would then receive written instructions. I
23 don't think any such letter was sent.

24 Q And you don't believe that, based on the,
25 having put Waste Management through the difficulty of having
26 forced them to file a special exception application which was

1 then not accepted by the BZA because regulations were
2 proposed, and your having indicated to Waste Management's
3 counsel that Waste Management shouldn't proceed further until
4 DCRA got its act together, and Waste Management wrote you a
5 letter saying we understand what you've said and you will
6 provide us with written instructions, you're contending that
7 it was not necessary or appropriate for DCRA to respond
8 specifically to Waste Management?

9 A Because DCRA never agreed to provide written
10 instructions. A letter was sent and to the extent that it
11 said, look, we're not going to do anything until some things
12 change, well once the Zoning Commission promulgates its
13 regulations, I think Waste Management it's incumbent upon them
14 at that point to go back to DCRA. Is this what we've been
15 waiting for? Is that what, shall we respond to this now?

16 Q Mr. Berger, in response to that letter you are
17 referring to, did you ever tell Waste Management no, this is
18 not, your understanding is not correct?

19 A You mean in terms of what the government was
20 going to do in the meantime?

21 Q Did you respond to that letter by saying no,
22 your understanding is not correct?

23 A Um, I think some of the response was that we
24 agree with some of the letter and not all of it. And I think
25 that's what the response --

26 Q Did you do in writing?

1 A It was not done in writing, no.

2 Q Okay. I have no further questions.

3 CHAIRPERSON REID: Thank you. We now move to
4 the ANC Report. Has there been any representatives of the ANC
5 to come in in the interim from the beginning of this case when
6 I first asked about it? If not, then Ms. King, do you have
7 the letter? We have a letter that has been submitted to us
8 from the ANC.

9 VICE CHAIR KING: This letter is dated
10 September 17. ANC 5 (A) support the community's and the single
11 member district commissioners' opposition to the Certificate
12 of Occupancy for BZA Case 16451 and 2 Cases. They held a
13 monthly meeting on September 7 at 7 p.m. The Commission voted
14 with a quorum present to support the community's opposition to
15 the two appeals filed by Waste Management. And the reasons it
16 has a serious environmental impact on the Woodridge community
17 because of rodents, groundwater pollution, air pollution and
18 noise pollution and that Waste Management has not fulfilled
19 its commitment to community outreach. We are also concerned
20 about the business community's perception of this area as a
21 dumping ground. It's signed by Norma A. Broadnax, chairperson
22 of the ANC.

23 CHAIRPERSON REID: You didn't mention that
24 there was a vote taken and quorum present.

25 VICE CHAIR KING: She said vote and a quorum
26 was present.

1 CHAIRPERSON REID: Okay. So therefore the ANC
2 would be afforded the great wait to which they're entitled.
3 Thank you.

4 We move now to the intervenors case but before
5 we do that I'd like, for the record, indicate that we've had
6 withdrawal of opposition to this case on behalf of Mr. is it
7 Getlin? Sorry. Mr. Galesh. That has been submitted by his
8 attorney, Mr. Glasgow, as well as himself. So that opposition
9 has been now changed to support of the application.

10 We also have in our file today a petition of
11 support that came in from many community persons and
12 businesses, it was rather extensive.

13 COMMISSIONER HOOD: Madam Chair, I have
14 reviewed this report and I don't know what my colleagues think
15 when I'm looking here, we have duplicate signatures,
16 triplicate signatures. I'm very appalled actually that this
17 would even be presented to this Board in this fashion. We
18 even have names with no addresses. So I would like to see
19 this stricken from the record.

20 CHAIRPERSON REID: I have not had an
21 opportunity to look at it. Mr. Hood, your testimony I find
22 rather surprising because I was not aware of the fact that you
23 say there were signatures that were placed on it, the same
24 signature three times?

25 COMMISSIONER HOOD: What I'm doing I'm looking
26 at repetitive. We have, for example, on page 3 of the

1 submission, and I believe in being fair across the board.

2 CHAIRPERSON REID: Page 3?

3 COMMISSIONER HOOD: Yes. You will see three

4 different, you'll see the same addresses in three different

5 places.

6 CHAIRPERSON REID: Where?

7 COMMISSIONER HOOD: Page 3 of the document.

8 CHAIRPERSON REID: Okay. Which specifically is

9 that 1, 2, and 3?

10 COMMISSIONER HOOD: Dolores Gerardo.

11 CHAIRPERSON REID: That's three. Three persons

12 at the same address?

13 COMMISSIONER HOOD: Same address.

14 CHAIRPERSON REID: That would not be uncommon

15 would it?

16 COMMISSIONER HOOD: Well, it depends on what

17 point you're trying to prove. Also, when you look back here

18 on another page you see names with no address.

19 MR. GILREATH: Madam Chair, given the -- of

20 this entry here, to dismiss all of those with possibly a

21 problem with two or three --

22 CHAIRPERSON REID: I don't think that that --

23 MR. GILREATH: I am reluctant.

24 CHAIRPERSON REID: Yes, and just because it's

25 Mr. Hood, I think that we should note for the record that

26 there are some discrepancies in this submission of the

1 petition. Nonetheless, I think that I would concur with Mr.
2 Gilreath that it doesn't warrant completely striking the
3 entire document from the record.

4 MR. SOCKWELL: Madam Chair, I disagree that a
5 document that has forgeries and/or other inconsistencies
6 cannot be accepted in part, would have to be accepted in
7 total, as a form for the Board of Elections and Ethics would
8 be voided if it were witnessed by a person who did not see the
9 signatures. Given it's been done in the past, I notice that
10 some of the signatures are obviously done of different names
11 with identical handwriting -- which is rather unusual.

12 CHAIRPERSON REID: Mr. Sockwell, I think that
13 we have to be very careful --

14 MR. SOCKWELL: Well appear to be.

15 CHAIRPERSON REID: I think that alleging
16 forgery.

17 MR. SOCKWELL: Well let's say that in --

18 CHAIRPERSON REID: You've got to be careful
19 about that because we just don't know.

20 MR. SOCKWELL: I understand. I understand.
21 See I do have -- when two people with different names do the
22 same Fs and the same Ys and the same Ds and are two different
23 names, it seems a little unusual to me.

24 CHAIRPERSON REID: I understand that. But
25 nonetheless what we have to be very careful about is setting a
26 precedent. Typically, when petitions are submitted to us, we

1 accept them on their own merit, noting if we have some
2 concerns but I would not feel that it would be appropriate in
3 this instance to completely throw the whole petition of the
4 document that has been submitted to us that comes from the
5 community, predicated upon what we may or may not suspect. I
6 think that that would not be appropriate.

7 COMMISSIONER HOOD: Madam Chair, for
8 clarification let's not throw out the whole document. That
9 was not my intent. What I'm saying is for the purpose of the,
10 now double -- I see that here, that's fine. But we have a lot
11 of names with no address that would not hold up anywhere else
12 in this process and I think that should be stricken from the
13 record.

14 CHAIRPERSON REID: Okay. I think that your
15 point's well taken and looking over the document during the
16 time of deliberation, we will take that into consideration.
17 But I don't think that we can, that it's appropriate for us to
18 throw out the baby with the bath water.

19 MR. SOCKWELL: Let me ask a question.

20 COMMISSIONER HOOD: Can we just say that we
21 will, okay, you want to wait until deliberations? Because I
22 feel very uncomfortable with accepting a report where you just
23 have names and dates with no address, because we don't know
24 where they live.

25 CHAIRPERSON REID: Well that's what I said, but
26 that does not negate the fact that there are some legitimate

1 citizens here.

2 COMMISSIONER HOOD: Yes ma'am. Yes ma'am.

3 CHAIRPERSON REID: And that we have to give
4 credence to those persons who have, in all good faith, signed
5 the document and when we deliberate we can then bring this up
6 as an issue and determine how we want to handle it.

7 COMMISSIONER HOOD: Okay. Thank you.

8 CHAIRPERSON REID: Okay, thank you.

9 MR. WILSON: Benjamin Wilson for Waste
10 Management, and with all due respect to Mr. Hood I was just
11 shown a copy of what I believe has been submitted to you, a
12 particular list that he just showed addresses for each of the
13 individuals. I would like to make certain that we have not
14 given you something that (a) is inappropriate, (b) I would
15 also hasten to add, may I approach you and show the list?

16 COMMISSIONER HOOD: Sure. The only thing I can
17 work with, Mr. Wilson, is what I have. And what I have here
18 is incomplete document --

19 CHAIRPERSON REID: Mr. Wilson, give the staff,
20 just a moment, give the staff please what you have so that it
21 can be compared.

22 MR. SOCKWELL: I think there are two different
23 formats for the signature pages and it creates confusion in
24 being able to document effectively what is here. You have
25 signatures without addresses because the headings were changed
26 and therefore it renders the document slightly inconsistent.

1 And those inconsistencies alone would negate some of the pages
2 being acceptable, unless you delete names that didn't have
3 addresses and accept all the names that do. If you want to
4 just do it that way. The attorneys for Waste Management might
5 wish to annotate a copy of the document and let us use that as
6 their official desired submission.

7 MR. WILSON: Mr. Sockwell, I think that's a
8 good suggestion. Perhaps at the break if we might meet with
9 counsel for the Board and counsel for the government so we're
10 all looking at this at the same time. I appreciate Mr. Hood's
11 point. He wants to make certain that any signature's
12 legitimate. What I would say on behalf of those citizens who
13 did sign as I think Ms. Reid already suggested, it is not
14 unusual for several people to live at the same address and to
15 sign a petition. I also respect Mr. Sockwell's point -- I
16 happen to chair the Board of Elections and Ethics in the
17 District of Columbia -- and so I do appreciate his point that
18 if we see something that appears to be signing the same name,
19 that gives him pause.

20 If we might, at the appropriate break, speak
21 with counsel in her presence and in Ms. --

22 VICE CHAIR KING: Excuse me, Madam Chair, this
23 petition, as I read it, has absolutely nothing to do with the
24 legal question as to whether or not the zoning administrator
25 acted properly or not. The appellants, or whatever they're
26 called, appellants, I guess I got that right, keep confusing

1 the case that we are considering today with their application
2 for a special exception. The petition relates to a special
3 exception that has absolutely nothing to say about the case
4 that's before us today.

5 COMMISSIONER HOOD: With that Commissioner
6 King, I withdraw my comments but, again, Mr. Wilson as you
7 know, things are not legitimate unless they have an address.
8 Being with Elections, you know how that system goes, and I
9 just want to make sure this Board was compliance. That was
10 all it was. Not throwing away the whole issue but deal with
11 those.

12 CHAIRPERSON REID: Thank you.

13 MS. RAY: Venita Ray on behalf of the
14 government. We just renew our objection which I think we made
15 earlier this morning about admissibility over the petition
16 anyway because it didn't go to the issue of what the Zoning
17 Administrator's decision said.

18 VICE CHAIR KING: Whether we admit it or not
19 it's not germane.

20 MR. GILREATH: Madam Chair, if we took that
21 gambit I think half the testimony here today is irrelevant.

22 VICE CHAIR KING: You're absolutely right, Mr.
23 Gilreath, you're absolutely right.

24 CHAIRPERSON REID: Nonetheless, Mr. Gilreath,
25 your point's well taken, let's get some order here. Let me
26 just say this, this is not your typical case that comes before

1 us. The manner in which this case is being presented within
2 itself is unusual and, yes, there were instances where we did
3 kind of digress from the beaten path. Nonetheless, I think
4 that in order for us -- and for myself in particular, I don't
5 know how other Board members feel -- to get our arms around
6 this whole situation to be able to make an intelligent
7 decision that what we heard here today certainly is not
8 unwarranted and it certainly was not unhelpful to us, and I
9 think that was the whole point. If you try to do it strictly
10 based on the legal aspect it would be very difficult for me to
11 draw what I would consider to be a full conclusion. So, yes,
12 we did kind of both from sides, nonetheless I think that each
13 side had a fair opportunity to be able to present and it gave
14 us the opportunity to be able to have, even though some of the
15 information is frivolous and unnecessary, you know it's better
16 to have more than enough than not to have enough to be able to
17 decide adequately.

18 MR. WILSON: And Ms. Reid it's in that spirit
19 we submitted this information. I also just want to note very
20 briefly, in addition to I believe the petition there were also
21 a number of letters, individual letters from individuals and
22 business people that we would respectfully request the Board
23 --

24 COMMISSIONER HOOD: Be very clear that I was
25 not trying to omit the letters or the things that I thought
26 that were deemed necessary and legitimate. It was just the

1 ones that were just names, and you know how that system works.

2 No further comment.

3 MR. WILSON: I heard you very clearly and I
4 appreciate your point.

5 CHAIRPERSON REID: I'm sorry. The whole point I
6 was making was that there are, just for the record, just to
7 note, relevant or not, that there have been submitted to us
8 letters of support and a petition. And how we handle it we
9 will determine that at the moment of deliberation.

10 MR. SOCKWELL: Madam Chair, there are
11 apparently, from my count, 13 signatures that have no
12 addresses associated with them and therefore the signatories
13 could not be deemed proximate to the facility in question.

14 CHAIRPERSON REID: All right.

15 MR. GILREATH: Madam Chair, I have no problem
16 with that but if we excise those 13 there is still a rather
17 substantial number of people, but if you want to delete --
18 excise those, sure.

19 CHAIRPERSON REID: We'll make the
20 determination.

21 MR. SOCKWELL: -- if we don't know where these
22 people reside.

23 MR. GILREATH: Well I think, we'll just simply
24 eliminate them as supporters.

25 COMMISSIONER HOOD: But Madam Chair, may I
26 interject? I think Ms. King's point is right, put us back in

1 focus and back on target. We tend, we're human too and we
2 tend to get off but I think Ms. King's point will put us back
3 on focus. It's irrelevant. We need to move forward.

4 MR. GILREATH: But I would like to say I think
5 much of this testimony is still valuable, even though it does
6 not deal with the legal aspects, it gives us context. And it
7 gives me a much better understanding than I'd otherwise had so
8 I think that all the testimony has been generally valuable and
9 useful -- at least to me.

10 CHAIRPERSON REID: Thank you.

11 MR. WILSON: There was information from an ANC
12 that was not taken at that time. And the question is may that
13 person with that information be heard?

14 CHAIRPERSON REID: Well, remember we said was
15 that would be treated as any individual who --

16 MR. WILSON: I was speaking of something of a
17 different ANC person who happens to be here now.

18 CHAIRPERSON REID: Oh, a different ANC person?

19 MR. WILSON: Yes ma'am.

20 CHAIRPERSON REID: Well this is not a hearing
21 where we take testimony from people in support or opposition,
22 if you notice. However, if there was a written submission or
23 something then we said that we would accept that into the
24 record.

25 MR. WILSON: I believe there's a written
26 submission that a person signed individually and they would

1 like to sign it in their capacity as an ANC commissioner.

2 CHAIRPERSON REID: That can be submitted with
3 the rest of the single member district ANC letters that you
4 have in your possession. We have no problem with that.

5 COMMISSIONER HOOD: I think that's from
6 ANC-5A-12 I believe. That's what he's referring to.

7 CHAIRPERSON REID: Yes. Were you going to say
8 something?

9 MR. WILSON: Actually, I was referring to
10 5B-02.

11 COMMISSIONER HOOD: 5B-02? Is that the ANC in
12 which the establishment is located?

13 MR. WILSON: No. It is an ANC that is
14 affected.

15 CHAIRPERSON REID: If it's affected then we --

16 MR. WILSON: It is an ANC that borders, if you
17 will, our facility and is affected by the facility. I do not
18 wish here, with all respect, Mr. Hood and every Board member,
19 to tell you all your business for a moment. You've been at
20 this a long time, a very long time today. All we respectfully
21 request is that individuals that cared enough to come out or
22 to write, pro or con, that they be heard. And I appreciate
23 that.

24 CHAIRPERSON REID: Do you mean orally or you
25 mean --

26 VICE CHAIR KING: The letters in our files. I

1 received a letter this afternoon.

2 CHAIRPERSON REID: Mr. Wilson, do you mean
3 orally or do you mean to submit their --

4 MR. WILSON: I mean orally but I'm also saying,
5 yes.

6 CHAIRPERSON REID: And this appeal, this is
7 not, you see this is a little different procedure, Mr. Wilson,
8 this is not a case, this is an appeal and in that particular
9 instance, and I'll reiterate it I went over it this morning
10 the procedure, and that is statement and witnesses of the
11 appellant and then the zoning administrator or other
12 government officials, then the ANC within which the property
13 is located, then the intervenors case and we have one
14 intervenor who has withdrawn and has changed now to support
15 and we have an intervenor who is going to be coming forth
16 individually. And then rebuttal and closing remarks. There
17 is no segment allowed for individuals to testify in support or
18 in opposition in an appeal. But they can submit letters and
19 those letters can be given to staff.

20 MR. WILSON: Okay. Obviously, let me just say
21 this. I accept the error in not appreciating that. There are
22 some people who have taken the time to be here for much of the
23 day and we will have an opportunity to have them speak briefly
24 as rebuttal witnesses.

25 CHAIRPERSON REID: No, no, they can't do that.

26 COMMISSIONER HOOD: But Madam Chair --

1 CHAIRPERSON REID: The rebuttal comes from the
2 applicant. And I'm awfully sorry, Mr. Wilson, but the
3 procedures that have been set forth for appeals cannot be
4 altered. We have to go strictly by the procedural
5 administrative law doctrine.

6 COMMISSIONER HOOD: Madam Chair, if I just may
7 add. I'm not exactly sure of the appeal procedure myself but
8 if the ANC that's most affected has it in writing, could it
9 then be accepted, because I would be very interested in
10 seeing. If that does not hinder the appeal process.

11 CHAIRPERSON REID: Everything that anyone wants
12 to submit in writing can be accepted.

13 MR. WILSON: Okay.

14 CHAIRPERSON REID: As a matter of fact, I think
15 as of today, as of today, whatever submissions you want to
16 make, the record's still open and that could be done.

17 MR. WILSON: And what we will do before the day
18 is out is meet with counsel to address these earlier issues
19 discussed. Thank you very much.

20 CHAIRPERSON REID: Okay. Thank you. The
21 intervenor?

22 MR. RALSTON: Madam Chair, Members of the
23 Board, I am David Ralston of the law firm of Hopkins and
24 Sutter, representing the intervenor Custom Machinery Co., Inc.
25 I will, I think, be uncommonly brief for a lawyer.

26 CMC owns the real property at 2230 Adams Place,

1 N.E., Washington, D.C. 20018, also known as Parcel 154/86.
2 CMC's property is adjacent to and within 200 feet of the
3 subject property, namely the waste transfer facility operated
4 by Waste Management of Maryland, Inc., located at 2160 Queens
5 Chapel Road, N.E. CMC conducts at that location its business
6 of sales, warehousing, distribution and consulting regarding
7 the repair of laundry and dry cleaning equipment at the Adams
8 Place location.

9 As previously identified on one of the exhibits
10 by the applicant, or the appellant, we are the property that
11 is bounded on three sides by the proposal, two sides by the
12 actual facility, one side by the facility and two sides by
13 that apparently partially leased access road that comes off of
14 Adams Place to serve the back of the property.

15 I think the factual record has been well
16 developed by the parties today and that our testimony as to
17 any actual negative impacts would only be accumulative of the
18 prior testimony that has been submitted, and we would adopt
19 the testimony, as far as the factual testimony has been
20 developed by the parties. Finally, I'd note I think that the
21 Board has rightly focused that this is a legal issue case on
22 two or three legal issues, and I think that the comments of
23 Board members certainly indicate that's well appreciated and I
24 think well focused and I think that is about all that we need
25 to say at this point in time.

26 Thank you for your --

1 VICE CHAIR KING: Thank you for your brevity.

2 CHAIRPERSON REID: Well thank you very much,

3 Mr. Ralston, thank you very much. At this late hour you can

4 imagine how very much appreciated your testimony -- your brief

5 testimony -- has been. So basically just adopt what has

6 already been submitted here today. Thank you very much. Mr.

7 Wilson, you asked for a brief recess to kind of gather your

8 thoughts.

9 MR. WILSON: Gather our thoughts before we make

10 our closing --

11 CHAIRPERSON REID: Five minutes?

12 MR. WILSON: That'll be fine.

13 CHAIRPERSON REID: Okay. Five minutes and then

14 --

15 VICE CHAIR KING: So how long are the closing

16 remarks going to be, Mr. Wilson?

17 MR. WILSON: My closing remarks should be less

18 than, about ten minutes, ma'am.

19 CHAIRPERSON REID: Okay. So we'll be out of

20 here at six o'clock right?

21 MR. WILSON: Well from my standpoint, I can't

22 speak for others, but yes, ma'am.

23 CHAIRPERSON REID: Okay. Thank you.

24 (Whereupon, the foregoing matter went off the

25 record at 5:48 p.m. and went back on the record at 5:53 p.m.)

26 CHAIRPERSON REID: -- today's hearing, the

1 rebuttal.

2 MR. WILSON: Madam Chairman, what I propose to
3 do in order to save time is --

4 CHAIRPERSON REID: Well, yes.

5 MR. WILSON: There are several issues that I
6 would like to address. One preliminary issue, please. One,
7 we understand that it is your practice to give for the BZA to
8 give great weight to an ANC position. However, quite, frankly,
9 I think when you review the ANC letter of September 17, that
10 letter, as has been said about some other letters today --
11 does not address the legal issues before the Board. It
12 contains generalized statements against the facility. And so
13 we believe that that letter is not entitled to great weight.

14 I think you will also see in the other letter
15 filed by the ANC Commissioner in opposition, apparently this
16 meeting was called with less than seven days notice and
17 apparently before one can take action as an ANC, one must at
18 least give seven days notice and I think as Mr. Adolph noted,
19 certainly at no point did we ever have an opportunity, we
20 Waste Management, excuse me, did not have the opportunity to
21 meet -- though we made any number of efforts to do so.

22 If I could ask this Board to do one thing, not
23 ask, I certainly wouldn't demand, but I certainly would beg,
24 that you read Exhibit E in the coming days as you look at this
25 issue. Exhibit E had the application itself dated November
26 21, 1995. I pledge to get you a copy of the original with the

1 signatures, Mr. Sockwell, I think your request is certainly
2 more than appropriate. But I ask you to read that. I believe
3 our application was clear about what we are trying to do.

4 You've heard a lot of discussion today about
5 subterfuge and deceit, whatever. I beg you to read our letter
6 of November 21. I think you'll find that we say, you know, we
7 knew the name change application was going to be an issue
8 because we knew how you all had ruled. We knew that had been
9 appealed to the Court of Appeals.

10 The name change application in effect is not
11 going to be acted upon by the BZA until such time as whether
12 or not Perkins had a valid C of O that he could even give to
13 us is resolved once and for all. We understand that. We made
14 it very clear that these applications were filed in a sense,
15 Mr. Sockwell, and I think a fair reading of this letter will
16 show it, in the alternative. Our client was doing what I
17 should do more often -- it was wearing belts and suspenders,
18 really hoping to keep its pants up.

19 I think it's apparent in the, you can see the
20 colloquy there between Mr. Berger and my colleague, Mr.
21 Mishkin. They met on numerous occasions, they wrote letters
22 to each other, they met face to face. We never operated in
23 secret. I think those who live in the community who know what
24 goes on there knows that there's no way Waste Management could
25 manage that facility out there in secret. You pass it every
26 day, you can't avoid it, and there are too many people

1 legitimately concerned about the community that would just
2 ignore what's going on.

3 So we beg you to read this, give it a fair
4 judgment, and you decide, is this is a lawyer trying a quick
5 pitch a D.C. government agency? Or is this rather the
6 approach of a careful attorney hoping to make certain they
7 dotted all i's crossed all t's to do it in the right way? And
8 I submit to you that's all we have ever done.

9 I sense and appreciate the frustration of this
10 Board. I mentioned I very briefly have chaired our Board of
11 Elections and Ethics, right down the hall, for almost ten
12 years. I know what it's to like to start the beginning of a
13 day and be here all day and to listen to, I think Ms. Ray, Ms.
14 Eubanks and Mr. Mishkin are wonderful but to listen to boring
15 Mr. Wilson that's a tough thing to do all day. And I
16 appreciate very much your patience and endurance of sometimes
17 repetitive questions.

18 So I do want to say this. In closing and my
19 closing now shouldn't take me very long, but through this
20 whole welter of facts that you've heard, there's one critical
21 question that must be answered. It's the one Ms. King talked
22 about, was Waste Management entitled to its Certificate of
23 Occupancy at 2160 Queens Chapel Road, N.E., as a matter of
24 right? We believe that the answer to this question is a
25 simple one. Yes.

26 Ms. King asked me a very good question at the

1 beginning of the day. She said, gee, if you guys comply with
2 the external effects, why don't you just go through the
3 special exception hearing? We could, but that is still a
4 discretionary process. And if one is entitled to something as
5 a matter of right then you don't run the risk, there are no
6 guarantees in a discretionary process. If you are entitled as
7 a matter of right, you have it, and obviously we prefer to
8 exhaust that effort first.

9 I once had a very wise teacher when I used to
10 think I was so smart, she used to say don't ever take a test
11 you don't have to take. And, again, if we are entitled as a
12 matter of right, we'd prefer to have it.

13 Now at the time Waste Management filed its
14 application for a Certificate of Occupancy as you've heard
15 today and no one has contradicted this, no solid waste
16 transfer station then operating in the District of Columbia
17 had a Certificate of Occupancy which explicitly stated that
18 the use of the property was going to be for the handling of
19 solid waste. Waste Management, unlike those renegade
20 companies who had no C of O, made no pretense of seeking a C
21 of O, was the first company to complete such an application.

22 Mr. Berger said, well, we didn't rush to get
23 there. Well maybe not, but we beat everybody else. Urged by
24 DCRA and others in the District of Columbia government to set
25 a precedent by being the first company to submit a C of O
26 which clearly stated its intention to manage a solid waste

1 transfer station, Waste Management not only filed an
2 application for carting or hauling to a terminal or yard, but
3 added the language that you all have been patient to look at
4 lines 9 and 10 of that same Exhibit E which is attached to the
5 letter I've discussed earlier.

6 Taking over the management of what was clearly
7 a crumbling building with broken windows and doors, noise,
8 dust, rodents, Waste Management began a long, arduous task of
9 trying to do business differently.

10 Mr. Adolph, you heard from him. Mr. Lee -- Mr.
11 Hood knew him, he was a very fine man, he's no longer with us.
12 Ms. Smith. They met and they continue to meet with City
13 Council members, with ANC Commissioners, with neighborhood
14 businesses, with long-time residents, and numerous community
15 groups. They did something unique for business -- they
16 listened. They attended forums. They accepted criticism and
17 sometimes ridicule. Ultimately, they learned and they made
18 changes in response to what they heard.

19 You heard briefly garbage trucks were no longer
20 permitted to drive through the residential neighborhood to the
21 transfer station, nor trucks permitted to turn left from the
22 transfer station onto Queens Chapel Road. You remember those
23 photographs.

24 Trucks do not queue up along Queens Chapel any
25 more or Adams Place. The old methods of doing business are
26 being done away with. Garbage is now handled on a tipping

1 floor in an enclosed, refurbished building.

2 Look at the photographs for yourself in the
3 privacy of your own deliberations, you'll see it's enclosed.
4 You'll see cosmetically it's a different place. Broken
5 windows have been repaired, missing doors have been replaced.
6 You may say big deal but that affects -- that affects the
7 intrusion on that neighborhood.

8 Rodent control measures have been undertaken on
9 a regular and consistent basis. That doesn't mean there's
10 never a rat. It's a garbage facility, it's a transfer
11 station. But we try to be vigilant and we've spent
12 significant money and effort to monitor that situation.
13 Dusty, unpaved grounds have been replaced by smoothly finished
14 areas. The picture speaks for itself. Grass has been planted
15 and landscaping has been done. Security has been upgraded and
16 better lighting has been installed.

17 To be sure, as my friend Ms. Ray she said, I
18 thought very eloquently, this is what any responsible company
19 should do. Waste Management shouldn't get any credit for
20 doing what's right. I agree with you but, unfortunately, all
21 too often this is not the case certainly in this business.

22 I think that's what Ms. Washington and others
23 were talking about, that the history of transfer stations in
24 this community has not been good and that's why we all, those
25 of us in the business, those of us regulating the business,
26 ought to be concerned.

1 Fortunately, we believe Waste Management has
2 acted responsibly. We believe the difference is apparent. I
3 think I'll be able to reconcile that list to your satisfaction
4 on the names, but whether the number's 50 or 37, the fact is a
5 large number of residents and businesses in this area now
6 support our project. There are numerous organizations that
7 submitted letters of support.

8 They are as diverse as the Hotel Association,
9 AOBA, the Chamber of Commerce, the Langdon School, the Dwight
10 Moseley Foundation. There are those who will argue that Waste
11 Management must meet the standard for external effects, for
12 noise, dust, odor, etc. and I want to be sure I'm looking at
13 Mr. Sockwell because he took me to school today and I want to
14 say unequivocally we agree with you.

15 We meet these standards and have met them
16 continuously since the application was filed in November 1995.
17 Mr. Sockwell's right. They apply to us. We have to meet them
18 not only when we apply, we have to meet them continuously. We
19 believe we do. We believe we have. Waste Management is not a
20 Johnny come lately to compliance.

21 Although not required to do so, proof of this
22 fact of our compliance with those external standards, was
23 transmitted at the time our application was filed. If you
24 look at our papers you'll see that we submitted written
25 information substantiating our compliance with external
26 effects. To this date, right now, we have never been

1 contradicted by the District government on the external
2 effects.

3 You know, I appreciate your frustration. Our
4 client has frustration, and that's why we appreciate your time
5 because you know what, you gave us all day. But this has been
6 four years and this is the first time, quite frankly, we've
7 really had an opportunity to present our view before a third
8 party. So thank you.

9 We think it's ironic that the District
10 government wishes to apply what we consider to be the new text
11 amendments, originally promulgated in 1996 and finalized in
12 1998 to Waste Management's November 21, 1995 application, even
13 though by their very terms those text amendments provide they
14 shall apply solely to those Certificate of Occupancy
15 applications filed on or after May of 1996 when the text
16 amendments were first initiated, and six months after Waste
17 Management filed its Certificate of Occupancy application.

18 The rules were changed in the middle of the
19 game. That's the most frustrating thing in the world in a game
20 or in life to find the rules change on you unfairly.

21 Ultimately, Waste Management does not seek
22 special treatment. We do not petition here for a special
23 break. We only ask that the laws of the District of Columbia,
24 the regulations of the District of Columbia be applied fairly.
25 We only ask that Waste Management receive justice, not unfair
26 treatment attributable to a changing of the rules in the

1 middle of the game approach described by Mr. Mishkin.

2 This is a case, in our view, of shameful
3 bureaucratic delay. It is a glaring disregard of the rights
4 of an essential business to operate in the District of
5 Columbia, whose only offense is that at this point we refuse
6 to continue to attempt the impossible goal of hitting a moving
7 target. This is the very type of mistreatment of a business
8 by the District government which we have long decried in our
9 city that must be stopped now.

10 CHAIRPERSON REID: Are you --

11 MR. WILSON: In closing, this Board has a
12 unique opportunity to send a signal that business as usual is
13 no longer the norm in the District of Columbia.

14 Our government has a duty, both legal and
15 moral, to provide justice under the law of equal justice under
16 the law, whether the citizen is black or white, male or
17 female, straight or gay, a Fortune 100 company or a struggling
18 business. Yes, Waste Management is a big company but it is
19 entitled to equal justice under the law. The government is
20 obligated to treat Waste Management and any other company and
21 any other citizen fairly. If we meet the criteria of the C of
22 O, our application must be granted.

23 (Whereupon, at 6:00 p.m. the hearing went
24 immediately into Evening Session.)

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3 MR. WILSON: As you deliberate today, and
4 perhaps in the days to come, please know that every major city
5 in America has transfer stations -- even Mr. Bernheisel told
6 us that. They are a necessity if costs for handling garbage
7 are to be managed for our citizens and for business. The only
8 question ultimately we're going to have to answer in
9 Washington, D.C. is who's going to operate those transfer
10 stations?

11 Rogue companies with no interest in our
12 communities? A major company who flouts our statutes and
13 regulations? I pray not. Ultimately, the handling of trash
14 is a public health issue. We must have regulation, but it
15 must be reasonable. Government must have rules that are fair
16 and the application of these rules must be fair. We cannot
17 condone or endorse inconsistent application of laws and
18 regulations, for such action fosters a disrespect for law and
19 leads to the destruction of the ideals we hold dear.

20 We humbly ask and fervently pray to be treated
21 fairly. I trust we will have our justice. Thank you for your
22 patients.

23 CHAIRPERSON REID: Thank you, Mr. Wilson for
24 your most eloquent closing speech. I think Mr. Sockwell has
25 one question. Ask it.

26 MR. SOCKWELL: Yes. Actually I have a yes or no

1 and a couple of others are almost yes or no. One, your odor
2 control devices were voluntarily installed because you were
3 not requested to meet any particular city standards, as you've
4 stated. Did Waste Management at any time provide
5 certification, testing results, specifications or request
6 voluntary criteria from any District agency with regard to
7 those devices which would, had they been required, be
8 necessary.

9 MR. WILSON: I think Mr. Mishkin can answer
10 that question. I'm not certain.

11 MR. SOCKWELL: And it could be yes or not.

12 MR. MISHKIN: Actually, Mr. Sockwell, if we've created
13 the impression that the odor control system is voluntary it
14 is, the regulations require a ventilation system that sucks
15 the air in and exhausts it on the roof.

16 The Waste Management system has a filtration
17 element to it as well. But it was installed with the intent
18 of complying with the regulations. We believe it is the only
19 facility in the District that does so comply, and a permit to
20 operate the air pollution control device was filed with the
21 District of Columbia and lists the operating and design
22 characteristics and imposes conditions upon its operation. So
23 If I've clarified the situation for you, I hope I have on
24 that.

25 MR. SOCKWELL: That installation permit would
26 not have required the District to specify performance but

1 would merely have required the District to make sure that you
2 have the proper electrical and other connections and that you
3 didn't violate any zoning or other laws in such installations.
4 Because the agency that would have control over that is
5 Department of Health not the permitting agency.

6 MR. MISHKIN: That's correct.

7 MR. SOCKWELL: Okay. And one last question. Is
8 the Icebox still across the street?

9 MR. WILSON: The Icebox? I'm not certain --

10 MR. SOCKWELL: The Icebox is a nightclub across
11 the street from your facility.

12 MR. WILSON: No, it is not.

13 MR. SOCKWELL: Okay. It was there in 1995.

14 MR. WILSON: It was. In fact, my understanding
15 is that there was a recent, if I'm referring to the proper
16 nightclub, it befell a horrible fate. My understanding is a
17 roof may have collapsed recently.

18 COMMISSIONER HOOD: There was a --

19 MR. WILSON: Am I referring to the right --

20 COMMISSIONER HOOD: You want me to answer the
21 question? There was a fire.

22 CHAIRPERSON REID: Is this relevant?

23 COMMISSIONER HOOD: Right. Well there was a
24 fire and I'll leave it at that.

25 CHAIRPERSON REID: Okay, there was a fire.

26 MR. SOCKWELL: There may be a relevance in

1 time.

2 CHAIRPERSON REID: It's not there. It's no

3 longer there. Okay.

4 MR. WILSON: I wanted to answer your question

5 as currently as possible and I defer to Mr. Hood's point.

6 CHAIRPERSON REID: Right. And Mr. Hood, do you

7 have a question?

8 COMMISSIONER HOOD: No, I don't have a

9 question. I was just answering Mr. Sockwell.

10 MR. SOCKWELL: So something did happen to it.

11 Okay.

12 CHAIRPERSON REID: And is that your last

13 question, Mr. Sockwell?

14 MR. SOCKWELL: Yes.

15 CHAIRPERSON REID: Ms. King.

16 VICE CHAIR KING: There's no further documents

17 to come in or there's some letters?

18 CHAIRPERSON REID: There are. There are.

19 VICE CHAIR KING: Okay. The letters are going

20 to deal with the legal issues solely, not the special

21 exception.

22 CHAIRPERSON REID: I think the letters have

23 already been written. They're just going to come into the

24 record.

25 MR. WILSON: There are several things.

26 Caroline Brown, an associate in my firm, was kind enough to

1 remind me of all the important things I've forgotten. We owe
2 you the following things and if you would give us permission
3 to do that in the next couple of days we will do so. One, I
4 believe --

5 CHAIRPERSON REID: Just one second, Mr. Wilson.

6 MR. WILSON: Yes, Ma'am.

7 CHAIRPERSON REID: Where is staff to report
8 this.

9 MR. BASTIDA: Yes, we are invited in --

10 CHAIRPERSON REID: All right.

11 MR. WILSON: One, I believe Ms. Reid asked us
12 to find the Yellow Pages listing and provide that under the
13 Rubbish and Control where Waste Management is listed.

14 There was a large photograph that was used by
15 Mr. Adolph that was not a part of the book and I'd like to try
16 to arrange for you to get some smaller copies made to make
17 them available. In the alternative, we'd be willing to make
18 the one that we used available. We'd simply request when
19 you're done if we could have it back.

20 CHAIRPERSON REID: What was that?

21 MR. WILSON: There was a large photograph that
22 we had of the site that was not in the book.

23 CHAIRPERSON REID: Oh that one. The aerial
24 site, the aerial photograph, yes?

25 MR. WILSON: Yes, Ma'am. There was also a
26 request that was made I believe by Mr. Hood for a scaled

1 drawing that would demonstrate the number of feet our facility
2 is from the neighborhood residents. I want to respect Mr.
3 Hood's point, I don't know how the Board ultimately resolved
4 that. We are willing to go through that effort to get that
5 but I understood Mr. Hood to state that he'd prefer perhaps a
6 government agency to do that. So whichever the Board
7 instructs.

8 CHAIRPERSON REID: He wanted both. Both. One
9 from you and also he directed his staff to --

10 COMMISSIONER HOOD: I also asked staff to --

11 MR. WILSON: Okay. We will do that.

12 MR. SOCKWELL: Your Board actually is at
13 one-sixteenth inch equals four and a half feet which is no
14 scale but I could use it to reference and I got what I wanted
15 out of it.

16 MR. WILSON: Okay.

17 MR. SOCKWELL: But you should present something
18 that the rest of us who don't know how to do that can --

19 MR. WILSON: I certainly don't. Thank you, Mr.
20 Sockwell. I also believe that there was a request that you
21 made, Mr. Sockwell, that we get to you the C of O application
22 which reflected the signatures and a clear reading of the
23 date. I think we've given you one with a clear reading of the
24 date, but we still don't have the signatures.

25 CHAIRPERSON REID: There were three
26 applications were there not?

1 MR. SOCKWELL: Yes, there were three.

2 MR. WILSON: We will do that.

3 MR. SOCKWELL: A clear reading of the date was

4 not clear on the, the 5 didn't show up on one and the 95

5 didn't show up on the others.

6 MR. WILSON: What I think we could do, if it's

7 a reasonable time period, if we could have maybe three days to

8 get that information to you. And the final point, which I'd

9 like to do with Board counsel, I'm embarrassed, I don't know

10 your name. The young woman sitting there.

11 MS. SKIPPER: Janice Skipper.

12 MR. WILSON: If we could meet with Ms. Skipper

13 at the conclusion of this for a few moments and with Ms. Ray

14 or Mr. Eubanks will look at the list of signatures so we make

15 certain that we've given you what is correct and accurate.

16 CHAIRPERSON REID: Okay.

17 MR. WILSON: Is there anything else that we've

18 left out?

19 CHAIRPERSON REID: There was also some

20 discussion --

21 MR. WILSON: Okay. The final request, and I'm

22 sure you'll tell us at the appropriate time, is a Schedule for

23 Proposed Findings and responses, etc.

24 CHAIRPERSON REID: Okay. But one of the other

25 things was the accurate date for the promulgation of DCMR

26 Section 823, we need to be -- Yes?

1 MS. RAY: I think, Venita Ray on behalf of the
2 government. I think we were asked to do that and that's
3 definitely something we need to provide to the Board and we
4 will do so as soon as possible.

5 CHAIRPERSON REID: Okay. So let's say five
6 days from today.

7 MR. WILSON: Is that five business days?

8 CHAIRPERSON REID: Five business days.

9 VICE CHAIR KING: In other words a week.

10 CHAIRPERSON REID: Yes, to have the additional
11 information we've asked for and if both sides can provide us
12 with a draft order on disk that would be great. And we will
13 then deliberate this particular case on our next scheduled
14 meeting date which is October 6.

15 MS. RAY: Are you asking for the proposed
16 findings in five days also?

17 CHAIRPERSON REID: No, no. I don't know what
18 time frame we generally give them for that submission. Check
19 with staff, Mr. Wilson and Mr. Ray --

20 VICE CHAIR KING: Well they have to get it to
21 us by the Friday before, which would presumably be something
22 like the 2nd so they would have to come in on the 1st of
23 October. I don't have a calendar in front of me.

24 CHAIRPERSON REID: Okay. Does anyone have a
25 calendar?

26 COMMISSIONER HOOD: October the first is on a

1 Friday. Yes, October 1st is on a Friday.

2 CHAIRPERSON REID: Okay.

3 VICE CHAIR KING: So it would have to come in
4 on the 30th of September, preferably I should think with
5 sufficient copies so they can deliver one to each of us the
6 day before.

7 CHAIRPERSON REID: You mean the day after?

8 VICE CHAIR KING: I mean the day after. It's
9 been a long day.

10 MR. WILSON: May I ask a question about your
11 customary procedure and please correct me, I'm sure I'm wrong,
12 but my understanding is typically we come in with an initial
13 proposed finding and we either comment or respond to what the
14 other has done. If that's the process you want us to follow,
15 obviously we need some additional time.

16 CHAIRPERSON REID: Ms. Skipper, can you respond
17 to that?

18 MR. BASTIDA: I don't believe that's the case,
19 Madam Chair. If there is additional testimony and additional
20 things into the record, yes, there is the time, we could
21 surely give for the opposition to respond. But the Finding
22 from Facts and Conclusion of Law, they are all submitted at
23 the same time and there is no rebuttal for any --

24 MR. WILSON: Okay. I was looking at the
25 Section 3326.6 and --

26 MR. BASTIDA: And what does it say?

1 MR. WILSON: It says written responses shall be
2 filed within seven days following the date by which the
3 exhibits, information or briefs were due unless otherwise
4 directed by the presiding officer.

5 MR. BASTIDA: That is correct. But it doesn't
6 address Finding of Facts and Conclusion of Law. It is
7 additional information and exhibits, right?

8 MR. WILSON: I'm not challenging you. I was
9 just asking.

10 MR. BASTIDA: Okay. Thank you.

11 CHAIRPERSON REID: Yes, that typically if there
12 is additional information, submissions and it would be served
13 on both parties and there is a time line established but not
14 in regard to the Findings of Facts or the draft which would be
15 included within a draft order.

16 MR. WILSON: So you would like the Findings of
17 Fact then by September 30?

18 CHAIRPERSON REID: Conclusions. In other
19 words, the entire draft order which is the Findings of Facts,
20 Conclusion of Law --

21 MR. WILSON: And draft order by the 30th.

22 CHAIRPERSON REID: Yes. And it is all
23 inclusive. It's mutually, it's inclusive.

24 MS. RAY: Right. On disk?

25 CHAIRPERSON REID: Yes, preferably.

26 MR. WILSON: Yes, Ma'am, we understand. Thank

1 you.

2 CHAIRPERSON REID: All right. Does that do it?

3 Okay. All right. That concludes today's hearing. Thank you
4 very much.

5 (Whereupon, the above-entitled matter went off
6 the record at 6:21 p.m.)

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9